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Soldiers' Liability for Wrongs Committed on Duty

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SOLDIERS' LIABILITY FOR WRONGS COMMITTED ON DUTY

UNDER AMERICAN AND INTERNATIONAL LAW

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The soldier[1] is "liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it."[2] This paradox by Dicey paraphrases a paradoxical legal situation: The soldier disobeys any order at his peril,[3] and is liable both civilly and criminally for any wrong he may commit in obeying such order. Although this patently unjust rule has been "corrected" in many ways in its practical application, and probably has not caused too much injustice,[4] its reconsideration would seem appropriate at a time when it may unduly threaten ten million American soldiers in the execution of their duties, and, by some of its unjustified "corrections," unduly exempt thousands of enemy soldiers who may be tried for their crimes.

The problem of soldiers' liability is not limited to wrongs committed in obedience to superior orders. Any person injured by any military act may look to the soldier for redress and demand his punishment, although the "wrongdoer" may have acted within the scope of that discretion and initiative

[1]The term "soldier" will be used in this article in its broadest every-day meaning, as including all members of the armed forces.

[2]DICEY, LAW OF THE CONSTITUTION (8th ed. 1915) 299.

[3]Under Article of War 64, 41 STAT. 801 (1920), 10 U. S. C. § 1536 (1940), a soldier who "willfully disobeys any lawful command of his superior officer, shall suffer death or such other punishment as a court-martial may direct." As to willful disobedience of orders by noncommissioned officers see Article of War 65, 41 STAT. 801 (1920), 10 U. S. C. § 1537 (1940). Since "a command of a superior officer (as well as of a noncommissioned officer) is presumed to be a lawful command" [MANUAL FOR COURTS-MARTIAL (U. S. War Dept. Doc. No. 14a, 1927, *rev.* 1943) 149, 150], "an order requiring the performance of a military duty or act is disobeyed at the peril of the subordinate" (*ibid.*). Moreover, even "disobedience of an illegal order might under some circumstances involve an act of insubordination properly chargeable under A. W. 96" [*ibid.*, referring to Article of War 96, 41 STAT. 806 (1920), 10 U. S. C. § 1568 (1940), which concerns "all disorders and neglects to the prejudice of good order and military discipline."]. *See also* MUNSON AND JAEGER, MILITARY LAW AND COURT-MARTIAL PROCEDURE (1941) 25, 29, 30. Section 8 of the Russian "DISCIPLINARY CODE OF THE RED ARMY" of October 12, 1940 requires the soldier to execute any order "without reservation." LIBRARY OF CONGRESS, COURTS MARTIAL LAW (1943) 5.

[4]Where the soldier is not acquitted by the jury, he is likely to be indemnified for his civil liability and pardoned for his criminal liability. Moreover, he may be held only for nominal or mitigated damages, and will be excused from punitive damages. Milligan v. Hovey, 3 Biss 13, 17 Fed. Cas. 380, No. 9,605 (C. C. D. Ind. 1871); McLaughlin v. Green, 50 Miss. 453, 461 (1874); Johnson v. Jones, 44 Ill. 142, 166 (1867); Carpenter v. Parker, 23 Iowa 450 (1867).

which he was expected to exercise. While the policy problems here involved are similar to those arising with regard to acts done in obedience to specific orders, the two groups of situations have not been treated quite uniformly by the courts and therefore require separate discussion.[5] On the same ground it will prove expedient to distinguish between civil and criminal liability, and between the soldiers' liability to civilians and to each other. The usual distinction between acts performed in time of war and in time of peace will be replaced in this paper by the distinction between acts performed in emergencies and under ordinary conditions,[6] while the distinctions between discretionary and ministerial acts,[7] and between property damage and personal injuries will be abandoned as not warranted by the authorities.[8]

The liability of federal soldiers is still entirely governed by the common law. State legislation has never approached the problem and Congress has acted only indirectly by isolated *ex post facto* immunity statutes and by granting indemnity in certain cases to soldiers and to persons injured by military acts. Only one state has regulated the liability of her militia in federal service.[9] Most states have enacted statutes wholly or partly abolishing the criminal and civil liability of the members of their national guards or militias for acts committed while on duty in state service (*infra* p. 195). The resulting discrimination between state and federal soldiers of itself justifies a comparative analysis clarifying judicial and legislative approaches to the problem. The result of this investigation is likely to gain additional significance for the treatment of "war criminals" under international law.

[5]Commands given by officers in the exercise of their discretion are dealt with in this paper as "voluntary acts." See *e.g.* Note, *Civil Liability of Officer to Civilians for Acts of Militia* (1910) 16 ANN. CAS. 1164.

[6]These classifications of course, are not identical. On the one hand, in peacetime military acts are often performed under war conditions. See Note, *Civil Liability of Soldiers Obeying Commands of Superior Officers* (1911) 59 U. OF PA. L. REV. 646. On the "extreme war-time theory of military action," see Note, *Use of Military Force in Domestic Disturbances* (1936) 45 YALE L. J. 879, 883; WIENER, A PRACTICAL MANUAL OF MARTIAL LAW (1940) 28 *ff.* A declaration of "martial law" proper seems to be provided only in a few states. FAIRMAN, THE LAW OF MARTIAL RULE (1943) 96 *ff. See also* Fairman, *Martial Rule in the Light of Sterling v. Constantin* (1933) 19 CORNELL L. Q. 20. On the other hand, a state of war does not necessarily imply the existence of an emergency. See *e.g.,* Note, *Soldiers' Obedience to Orders* (1940) 90 L. J. 250, discussing the case of a lance corporal shooting at a recalcitrant motorist during an air-raid alert at the order of a sergeant. Rex v. Taylor, 90 L. J. 227 (1940). The court stressed the fact that war-time England was not under martial law, but under the ordinary criminal law. *See also* Note, *Civil and Criminal Responsibility of Soldiers and Militiamen* (1915) 53 L. R. A. (N. S.) 1141, 1163; GLENN, THE ARMY AND THE LAW (ed. Schiller, 1943) 167, 173.

[7]See *infra* note 56.

[8]*But see* RESTATEMENT, TORTS (1934) § 146 which is limited to "invasions of interests of personality." *See also* IND. STAT. ANN. (Burns, 1933, Supp. 1943) § 45-1202; ILL. REV. STAT. ANN. (Smith-Hurd, 1935) § 197.

[9]See *infra* p. 195.

I. The Common Law

A. Civil Liability

1. Voluntary acts and orders

(a) Ordinary conditions—A voluntary wrongful act will not, as a rule, be excused as occurring in the exercise of military duties even if committed in good faith. A colonel of the New York militia who, on the erroneous assumption that all muskets of his soldiers contained blank cartridges, had ordered them to fire against a crowd of spectators, was held liable for injuries caused by such firing.[10] The existence of a privilege to inflict harm in the exercise of military functions, which was denied impliedly in that case, was rejected expressly in another peacetime case where defendant militia officer, who had ordered an encampment to be made on private land without the owner's consent, claimed unsuccessfully that "private rights of person and property are reasonably subservient" to "public operations for the common defense."[11] That "no further damage was done . . . than necessarily resulted from the reasonable use . . ." was held irrelevant;[12] and so was the fact that defendant had "acted without malice or any actual wrong intent." Good faith as a defense was generally rejected by the Supreme Court in *Bates* v. *Clark*[13] where defendants, United States officers, were held liable for the seizure of a lot of liquor about to be introduced into what they

[10]Castle v. Duryee, 2 Keyes 169 (N. Y. 1865). This and similar decisions may, to some extent, have been the result of a certain hostility to the institution of the militia, a hostility which is probably as old as that institution itself. See Colby and Glass, *The Legal Status of the National Guard* (1943) 29 Va. L. Rev. 839, 840. The same attitude appears in Moody v. Ward, 13 Mass. 299, 301 (1916), where a horse, frightened by the shots of militia troops, was killed in an attempt to escape. The court, while holding for defendant officer on other grounds, said that the commanding officer might have been liable for any damage caused by "the mischievous and disgraceful practice of firing guns in and near highways." For a statutory expression of this attitude, see Minn. Stat. (1941) § 192.28, prohibiting "under penalty of dishonorable dismissal . . . the firing of blank cartridges upon any unlawful assemblage . . . under any pretense or in compliance with any order." For authorities on the rights and liabilities with respect to target practice in particular, see Note (1914) 31 Ann. Cas. 867. On the state militia in general, see Beckwith, Holland, Bacon and McGovern, Lawful Action of State Military Forces (1944); Book Review (1944) 57 Harv. L. Rev. 593. The broad scope of liability may also have been due partly to the courts' reliance on the liable soldiers' indemnification by private legislation.

[11]Brigham v. Edmunds, 7 Gray 359 (Mass. 1856). The court said that "such a right cannot be exercised except under the authority of the legislature . . . and with suitable provisions for compensation." *Id.* at 363.

[12]*But cf.* Hough v. Hoodless, 35 Ill. 166 (1864), holding against a commanding officer who had ordered the destruction of a building outside the military lines, because such destruction was "causeless and willful," since the building could have been easily moved on rollers.

[13]95 U. S. 204, 24 L. ed. 471 (1877).

erroneously believed to be Indian territory protected by an act of Congress. The Court stated that their honest belief in their authority was "'no defense in their case more than in any other, where a party mistaking his rights commits a trespass . . . ."[14]

(b) Emergencies—The rule that acting on duty does not excuse unlawful acts or orders applies in emergencies as well as otherwise, apparently even where a state of martial-law or of war has been formally declared.[15] It seems, however, that in such cases good faith can be claimed as a defense.[16] While this was denied in an early New York case,[17] the Supreme Court, in a suit for false imprisonment, held for defendant, who as a governor in the course of putting down an insurrection, had detained the plaintiff "without sufficient reason but in good faith."[18] Morever, the existence of a state of military emergency will be relevant in determining whether the harmful act was lawful as an exercise of lawful discretion.[19]

2. Acts performed in obedience to military commands

(a) Ordinary conditions—The fact that the wrongful act was committed under order has frequently been held not to affect full liability. In *Griffin* v. *Wilcox*[20] a deputy provost marshal was held liable for false imprisonment, though invoking an order to arrest anybody selling liquor to soldiers, because

[14]*Id.* at 209, 24 L. ed. at 473. *See also* Fairman, *op. cit. supra* note 6, at 296; WINTHROP, MILITARY LAW AND PRECEDENTS (1920) 882 *ff.*; 36 AM. JUR. (1941) 265, n. 8.

[15]See WINTHROP, *op. cit. supra* note 14, at 889; RESTATEMENT, TORTS (Proposed final draft no. 1, 1934) § 141, p. 337.

[16]For the English law, see Pollock, *What is Martial Law?* (1902) 18 L. Q. REV. 158.

[17]Smith v. Shaw, 12 Johns. 257, 267 (N. Y. 1815), holding that good faith could not excuse defendant who, without jurisdiction, had remanded plaintiff to custody; a decision held to be "most unreasonable" by the dissenting judge. *Id.* at 271. Indeed, in Mitchell v. Harmony, 13 How. 115, 134, 14 L. ed. 76, 83, 84 (U. S. 1851) (see *infra* note 30), it was held that in spite of good faith, the taking of private property in wartime in order to prevent it from falling into the hands of the enemy, or for public use, is unjustifiable in the absence of "immediate and impending" danger. This rule has been accepted as the prevailing one by the restaters of the law of torts. See RESTATEMENT, TORTS (Proposed final draft No. 1, 1934) § 141, p. 337 with authorities. The present New York rule is probably represented by the more recent case of Hawley v. Butler, 54 Barb. 490 (N. Y. 1868), where the court, holding for defendants in an action for false imprisonment, said that "where there is probable cause. . . the officer acting *without malice or bad motive,* will be protected, if acting in the line of his duty. . . ." *Id.* at 504 [Italics added]. Although the court did not expressly base this holding on the existence of an emergency, it stressed repeatedly the prevalence of a state of rebellion in the country. *Id.* at 496.

[18]Moyer v. Peabody, 212 U. S. 78, 84, 29 Sup. Ct. 235, 236 (1908). *See also* Druecker v. Salomon, 21 Wis. 628 (1867); Hatfield v. Graham, 73 W. Va. 759, 81 S. E. 533 (1914); Hawley v. Butler, 54 Barb. 490 (N. Y. 1868).

[19]See RESTATEMENT, TORTS (1934) § 146 at p. 340.

[20]21 Ind. 370 (1863).

even an order from the President could not justify an encroachment upon the liberty of private citizens "in a State not in rebellion." The Supreme Court in the case of *Bates* v. *Clark*[21] made the similar statement that,

> Whatever may be the rule in time of war and in the presence of actual hostilities, military officers can no more protect themselves than civilians in time of peace by orders emanating from a source which is itself without authority.[22]

On the same ground the court in the case of *Franks* v. *Smith*[23] held for plaintiff in a suit for false arrest against members of the Kentucky militia, who had acted under unlawful orders of their superior officers.

Another line of authorities seems to favor, however, that more lenient attitude which has been formulated in the Restatement of Torts with respect to military "invasions of interests of personalty." Section 146 declares "such an invasion by a member of the armed forces of the United States or any of the several States thereof" to be privileged where it is "reasonably necessary for the execution of a command issued by a superior, if the command is (a) lawful, or (b) is believed by the actor to be lawful and is not so palpably unlawful that any reasonable man would recognize its illegality."[24]

The leading authority for this rule is *McCall* v. *McDowell*,[25] where the circuit court, 9th Circuit, holding for defendant in a suit for false imprisonment, expressed the opinion that "the law should excuse the military subordinate, when acting in obedience to the orders of his commander, . . . except in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal."

The problem was again judicially examined in the Massachusetts case of *Neu* v. *McCarthy*,[26] where plaintiff, driver of a United States army truck, was injured in a collision with defendant's automobile. The jury found that

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[21]95 U. S. 204, 24 L. ed. 471 (1877).

[22]*Id.* at 209, 24 L. ed. at 473. For statement of the facts of this case see *supra* note 13.

[23]142 Ky. 232, 134 S. W. 484 (1911). *See also* Bishop v. Vandercook, 228 Mich. 299, 200 N. W. 278 (1924). For a list of pertinent decisions from 1774 to 1911 see Brown, *Military Orders as a Defense in Civil Courts* (1917) 8 J. CRIM. L. & CRIMIN. 190. For further authorities see Notes, (1912) 25 ANN. CAS. 328, L. R. A. 1915A 1156; 6 C. J. S. (1937) 420; 36 AM. JUR. (1941) 265; *see also* WINTHROP, *op. cit. supra* note 14, at 886; Flood, *Martial Law and its Effect upon the Soldier's Liability to the Civilian* (1925) 73 U. OF PA. L. REV. 380; Johnstone v. Pedlar, 90 L. J. P. C. 181, 2 A. C. 262 (1821).

[24]RESTATEMENT, TORTS (1934) § 146. *See also* HARPER, TREATISE ON THE LAW OF TORTS (1933) § 59. For further authorities see RESTATEMENT, TORTS (Final draft No. 1 1934) p. 330, Explanatory Notes; GLENN, *op. cit. supra* note 6, at 161.

[25]1 Abb. 212, 15 Fed. Cas. 1235, 1240, No. 8,673 (C. C. D. Cal. 1867).

[26]309 Mass. 17, 33 N. E. (2d) 570 (1941).

the accident was caused by the negligence of both parties. The court, sustaining the plaintiff's exception, held that if it was true that he had received orders from his superior to disregard traffic lights, such orders, though illegal, "furnished a justification to the plaintiff for passing the red light," in conformity with "well considered cases" regarding "obedience to a military order as a justification for conduct which would otherwise give rise to a civil or criminal liability, unless the order is so palpably unlawful that a reasonable man in the position of the person obeying it would perceive its unlawful quality."[27]

(b) Emergencies—Both the strict and the lenient rule will be found in cases involving acting in emergencies. The Supreme Court has never overruled its decision in *Little* v. *Barreme*,[28] where instructions from the President were held not to exempt a ship commander from the payment of damages for illegal seizure. Marshall, C. J., pointed out (without discussing the question of good faith) that "the instructions cannot change the nature of the transaction, or legalize an act, which, without these instructions, would have been a plain trespass."[29] In the later case of *Mitchell* v. *Harmony*[30] the Supreme Court adhered to this principle even in a case involving military acts under actual battle conditions. In that case an army officer was held liable who, during the Mexican war, unlawfully forced plaintiff, a civilian trader, to accompany the forces with his wagons, mules and goods in a hazardous offensive expedition. The Court declared "upon principle, independent of the weight of judicial decision" that "it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior."[31]

The more lenient rule of justification by order has gained particular importance in cases involving acts committed in emergency situations. In the

[27]*Id.* at 22, 33 N. E. (2d) at 573. See Note (1941) 36 ILL. L. REV. 361. *See also* RESTATEMENT, TORTS (1934). § 146, p. 343, Comments, which draw a significant distinction between commissioned officers, on the one hand, who are required to know the contents of army regulations and general orders, and privates and noncommissioned officers, on the other hand, who are "entitled to assume that an order given by the superior is permitted by the regulations or general orders." *Cf.* 16 ANN. CAS. 1164 (1910) distinguishing between higher and lower officers.

[28]Little v. Barreme, 2 Cranch 170, 2 L. ed. 243 (U. S. 1804). *See also* Christian Co. v. Rankin, 2 Duvall 502, 87 AM. DEC. 505 (Ky. 1866); GLENN, *op. cit. supra* note 6, at 159.

[29]Little v. Barreme, 2 Cranch 170, 179 2 L. ed. 245, 246 (U. S. 1804).

[30]13 How. 115, 14 L. ed. 76 (U. S. 1851). *See also* Farmer v. Lewis, 1 Bush 66, 89 AM. DEC. 610 (Ky. 1866).

[31]Mitchell v. Harmony, 13 How. 115, 137, 14 L. ed. 76, 85 (U. S. 1851). Nor was it held sufficient in that case that the expedition was "undertaken from high and patriotic motives!" *See also* Milligan v. Hovey, 3 Biss. 13, 17 Fed. Cas. 380 No. 9,605 (C. C. D. Ind., 1871), where plaintiff, however, was awarded only nominal damages.

often-cited case of *Trammel* v. *Bassett,* [32]the Arkansas court, holding for defendant soldiers who had carried away private property at their superior's orders, seemed to recognize full immunity in acting under orders in time of war. The Montana court in *Herlihy* v. *Donohue,*[33] on the other hand, limited such immunity to obedience to orders of "apparent validity." While under this rule which is stated as the prevailing one in Section 146 of the *Restatement of Torts,* the existence of a state of emergency does not affect the general principle of liability, this fact remains highly relevant in the ascertainment of the scope of discretion which determines the actual or apparent lawfulness of the order.[34]

If the person injured by the wrongful act of a soldier cannot recover from the wrongdoer, either because the latter is financially irresponsible or because he has acted in good faith under conditions of emergency or in obedience to an order not palpably unlawful, and hence is not liable, the question arises whether recovery may be had against his superior. This superior will be liable for a voluntary wrongful order given in the absence of emergency or in bad faith. In other cases the applicability of the doctrine of *respondeat superior* may be decisive.

3. Respondeat Superior

A master, under general principles of the law of agency, may be liable under the doctrine of *respondeat superior* even for wilful acts of his servant. Occasional attempts to apply this principle in the law of military tort liability have been unsuccessful. Thus in a leading case[35] plaintiff, in an action for false imprisonment against the superior of two officers, contended that defendant "must be deemed, by relation, a party to the original arrest" since "every officer and soldier was under his absolute command and control."[36] The court, while holding for plaintiff on other grounds, declared that the

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[32]24 Ark. 499, 504 (1866). *See also* Taylor v. Jenkins, 24 Ark. 337 (1866).

[33]52 Mont. 601, 612, 161 Pac. 164, 167 (1916), involving an order, unlawful but "valid on its face," commanding the destruction of property.

[34]See RESTATEMENT, TORTS (1934) § 146. Comments, *id.* at p. 344, pointing out that "where there is no immediately pressing necessity, as when the militia are called out to quell some minor local disturbance, it may be that the inferior is not privileged to obey an order which he would not be permitted to question during the prosecution of a war. . . ." *See also* Ruan v. Perry, 3 Caines 120 (N. Y. 1854), where the commander of a United States warship had seized a neutral vessel under instructions directing him to send in vessels which, though covered by neutral papers, were suspected to be American. In an action for trespass the court held for defendant because there was no reason "to believe that the detention in the present cause was unreasonable." (*Id.* at 122).

[35]Smith v. Shaw, 12 Johns. 257 (N. Y. 1815).

[36]*Id.* at 263.

defendant's liability must depend upon his own participation in the act.[37]

It is more difficult to decide whether the doctrine of *respondeat superior* is applicable where the military act complained of was negligent. The most important instances are those of traffic accidents caused by the negligence of a member of the armed forces. The English doctrine seems to be clear. "Army authorities," rather than the military superior, are liable for a negligent soldier as "an ordinary master at common law for the negligence of his servant."[38]

This question has been repeatedly litigated in this country under statutes waiving generally,[39] or for special cases,[40] the immunity of the state against vicarious liability. It seems clear that militiamen are state "employees" or "agents" for whose negligence the state is liable under such statutes. The same theory underlies those federal statutes and decisions under which damages are frequently recovered for injuries sustained in accidents which were caused by the negligence of a member of the armed forces of the United States.[41]

However, in the recent case of *Goldstein* v. *State*,[42] the New York Court

[37]*Id.* at 265. A dissenting judge rejected the plaintiff's theory, "that a commanding officer is responsible for every act of an inferior officer or soldier under his command" as "a doctrine too absurd to require refutation." *Id.* at 269. *See also* Witherspoon v. Farmers' Bank, 2 Duvall 496 (Ky. 1866), where the court held for defendant, Confederate officer, sued for damages by a bank, which during the occupation of Mount Sterling in Kentucky had been robbed by his soldiers. *Cf.* Averey v. Bulkly, 1 Root 275 (Conn. App. 1800), where defendant's captain and lieutenant were held liable for an assault committed by some of their company under circumstances indicating that defendants must have known of it. *See also* BECKWITH-HOLLAND-BACON-McGOVERN, LAWFUL ACTION OF STATE MILITARY FORCES (1944) 65.

[38]Note, *Road Accidents and the Forces* (1941) 91 L. J. 6, citing HOLDSWORTH, HALSBURY'S CONSTITUTIONAL LAW. *But see* Cleveland v. Harries, 32 App. D. C. 300 (1908), where a commanding officer of the National Guard was held not liable for the negligent drowning of an enlisted man, because no negligence on his part was proved. No attempt seems to have been made to invoke the doctrine of *respondeat superior*. *See also* Howard v. Boner, 78 L. T. R. 3 (1943); Carolan v. Minister for Defence, 61 L. T. R. 27 (1926).

[39]See *e.g.* N. Y. COURTS OF CLAIMS ACT § 8; *infra* note 82.

[40]See *e.g.* Schmohl v. State, 141 Misc. 274, 252 N. Y. Supp. 474 (Ct. Cl. 1931), where a claim by a member of the National Guard who had been disabled as a consequence of the negligence of an officer, was granted on the basis of a special enabling act (N. Y. Laws of 1930, c. 818a) which had permitted a suit for damages sustained "by reason of the alleged negligence of the state, its officers, agents or employees." In Dicicco v. State, 152 Misc. 541, 273 N. Y. Supp. 937 (Ct. Cl. 1934), on the basis of a similar statute, liability of the state was confirmed where a member of the National Guard was fatally injured in a collision with a negligently operated truck of the National Guard. This case was cited and applied in Spence v. State, 159 Misc. 797, 288 N. Y. Supp. 1009 (Ct. Cl. 1936). *See also* Di Marco v. State, 110 Misc. 426, 180 N. Y. Supp. 500 (Ct. Cl. 1920).

[41]See *e.g.* Hebert v. U. S., 39 F. Supp. 267 (E. D. La. 1941), applying 52 STAT. 1398 (1938). See *infra* notes 81, 82.

[42]281 N. Y. 396, 24 N. E. (2d) 97 (1939).

of Appeals, under a general statute permitting claims against the state for "torts of its officers and employees," disallowed the claim for the death of a militiaman in a traffic accident caused by his fellow militiamen's negligence, because defendants were not acting in any employment of the state, but as "citizens performing a public duty under the Military Law."[43]

4. Liability between members of the armed forces

Litigation between soldiers of equal rank is rare. The classic case of *Weaver* v. *Ward*,[44] involving a skirmish between fellow soldiers "for their exercise *in re* military" can hardly serve as a precedent and seems to have had few successors. Suits of members of the armed forces against their superiors for unjust or illegal treatment, on the other hand, have been more frequent. In theory at least the rules governing such actions are the same as those applicable to claims of civilians. The older authorities were fully reviewed in *Wilson* v. *MacKenzie*,[45] where a sailor was allowed to recover against his commander for wrongful acts committed against him on the high seas under the color of discipline.[46]

[43]This decision has since been followed in the case of Kennedy v. State, 16 N. Y. S. (2d) 288 (Ct. Cl. 1939). *See also* Note (1943) 6 U. OF DETROIT L. J. 85; and Carmody v. Davis, 241 App. Div. 88, 270 N. Y. Supp. 711 (2d Dep't 1934), where a private car owner was relieved from liability for damage caused by his automobile while in military use. The same thought would seem to underlie the statement in the case of Spence v. State, *supra* note 40, where a member of the National Guard recovered against the state for the negligence of a fellow soldier, the fellow-servant rule not being applicable because the defendant and "the claimant were comrades in arms." But *cf.* Howard v. Boner, 78 Tr. L. T. R. 3 (1943).

There may be some doubt whether the Court of Appeals would uphold its interpretation at the present time. After the decision in the Goldstein case, *supra* note 42, the Legislature enabled the unsuccessful plaintiff by special act (N. Y. Laws of 1940 c. 857) to file a renewed claim, and this statute was upheld as constitutional because of the state's existing "moral obligation." Goldstein v. State, 175 Misc. 114, 22 N. Y. S. (2d) 767 (Ct. Cl. 1940). In another case, decided shortly after the Goldstein case, the Court of Claims allowed damages to an automobile passenger who had been injured in consequence of the negligent parking of army trucks by a detail of the National Guard, without the question even being raised whether the members of the Guard were to be considered as "officers or agents" under the enabling statute (Laws of 1934, c. 797). Gibbson v. State, 173 Misc. 893, 19 N. Y. S. (2d) 405 (Ct. Cl. 1940). Yet, as long as the decision of the Court of Appeals in the Goldstein case is not overruled, the state is apparently not liable for damage negligently caused by members of the militia, such persons being engaged in a public activity rather than in the employment of the state. For cases in other jurisdictions, see Note (1944) 150 A. L. R. 1456.

[44]Hobart 135, 80 Eng. Repr. 284 (1616).

[45]7 Hill 95, 42 AM. DEC. 51 (N. Y. 1895).

[46]*Ibid.* "Whoever set themselves up in opposition to the laws, or think themselves above the law, will in the end find themselves mistaken." Lieut. Frye v. Sir Chaloner Ogle, 1 MCARTHUR, COURTS MARTIAL (4th ed.) 268. *See also* Mallory v. Merritt, 17 Conn. 177 (1845); for further authorities see ANN. CAS. 1917 C, 8, 23. As to conflict of laws problems, see ROBINSON, ADMIRALTY LAW (1939) 240.

On the other hand, courts martial, even where not expressly declared immune by statute,[47] are held immune if acting within their authority, even though an error of judgment has been committed.[48] Frequently, a similar result is reached with non-judicial officers by conceding to them a wide range of authority and discretion in their dealings with their subordinates.[49] Thus in *Schuneman* v. *Diblee*,[50] a soldier was not permitted to maintain an action against the commandant of a garrison who, while holding him in custody, inflicted upon him further punishment, the defendant's "will and pleasure" being "his legitimate rule of conduct."

There seems to be some doubt as to whether this rule applies in cases of malice. In the early leading case of *Johnstone v. Sutton*,[51] the court, speaking through Lord Mansfield, reversed a judgment for plaintiff naval officer against his superior, and refuted the allegation of malice on defendant's part, pointing out that "a man from a malicious motive, may take up a prosecution for real guilt." In the similar case of *Dawkins* v. *Lord Rokeby*,[52] however, the same court, while again holding for defendant, partly based its decision on the absence of malice.[53] In the modern American case of *Gray* v. *Mossman*,[54] it was said, in a libel action by a sergeant against a captain, that such an action could be based on malice. This principle seems to have been adopted in many American jurisdictions.[55]

In conclusion it may be stated that the soldiers' civil liability under the common law is governed by the following principles:

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[47]See *e.g.* N. Y. MILITARY LAW § 141.

[48]See *e.g.* Vanderheyden v. Young, 11 Johns. 150, 159 (N. Y. 1814); BURKMEYER, MILITARY GOVERNMENT AND MARTIAL LAW (1914) 569, 571. *But cf.* Capron v. Austin, 7 Johns. 96 (N. Y. 1810) where a militiaman, in a suit against the president of a court-martial, recovered a fine imposed upon him for not having appeared at a military parade. And in the case of Mills v. Martin, 19 Johns. 7 (N. Y. 1821) plaintiff militiaman recovered two oxen taken from him in collection of a fine by defendant, a deputy marshal of the United States, under warrant from the president of a federal court-martial. *See also* WINTHROP, *op. cit. supra* note 14, at 882.

[49]Great weight seems to have been given to the consideration that suits between members of the forces should be avoided to preserve discipline without which the forces "would be a rabble, dangerous to their friends, and harmless to the enemy." Johnstone v. Sutton, 1 T. R. 492, 99 Eng. Repr. 1215 (1786). For a theory of "quasi-judicial" authority see GLENN, *op. cit. supra* note 6, at 156.

[50]14 Johns. 234 (N. Y. 1817).

[51]1 T. R. 492, 99 Eng. Repr. 1215 (1786).

[52]4 F. & F. 806, 99 Eng. Repr. 800, 814-815 (1866).

[53]*See also* Freer v. Marshall, 4 F. & F. 485, 176 Eng. Repr. 657 (1865), where a judgment for defendant in an action for the plaintiff's wrongful discharge was clearly based on the defendant's *bona fides*.

[54]88 Conn. 247, 90 Atl. 938 (1914).

[55]See *e.g.* Dinsman v. Wilkes, 7 How. 89, 130, 12 L. ed. 86, 125 (U. S. 1849); *aff'd* 12 How. 390, 13 L. ed. 1036 (U. S. 1851). *See also* Notes L. R. A. 1915A 1157, 1167, (1941) 135 A. L. R. 27, 31; 36 AM. JUR. (1941) § 119; 6 C. J. S. (1937) § 35, 36, 37.

(1) An unlawful order or act will not be excused because given or performed on duty under ordinary conditions in the exercise of free discretion,[56] even if such order or act was given or performed in good faith, as "a member of the military has no more authority to invade interests. . . than a peace officer."[57] If, however, the order or act was given or performed on duty under conditions of emergency, good faith seems to be a good defense.

(2) Whether acting under emergency conditions or not, a soldier is liable for wrongs committed in obedience to an order, if such order was "palpably illegal." But, at least, where the order was "apparently valid," he will probably be excused under the modern rule. Liberally applied, this exception is likely to become the rule.

B. Criminal Liability

The question whether a member of the armed forces is criminally liable for acts done on duty is often confused with the jurisdictional question of whether he can be prosecuted in the civil courts at all,[58] or, if so, whether he can be prosecuted in a civil court after having been tried by a court martial.[59] We are here concerned with the question whether a member of the armed forces, if duly arraigned before a civil court, can be punished for an act performed, in the line of duty, with or without a superior's order, in war or in peace.

1. Voluntary acts and orders

Authorities on the soldier's criminal responsibility for voluntary wrongful acts done while on duty are scarce. In the leading case of *United States* v. *Clark*,[60] a military guard had shot and killed a guardhouse prisoner trying to escape. Applying the rule of the "order" case of *Riggs* v. *State*,[61] under

[56]The theory of Druecker v. Salomon, 21 Wis. 621, 94 AM. DEC. 571 (1867), denying an officer's liability for false imprisonment because he had exercised an authority discretionary rather than ministerial in character, seems not to have been followed elsewhere.

[57]RESTATEMENT, TORTS (Proposed final draft no. 1, 1934) 337 Ex. Notes; *id.* at 342 Ex. Notes.

[58]*Cf.* United States v. Hirsch, 254 Fed. 109 (E. D. N. Y. 1918).

[59]*See e.g.* People v. Wendel, 59 Misc. 354, 112 N. Y. Supp. 301 (Sup. Ct., Cr. T. 1908), where an officer, dismissed from the service upon conviction of "conduct unbecoming an officer and a gentleman," was held triable for the same act in a state court on an indictment of grand larceny. The court distinguished the case of Grafton v. United States, 206 U. S. 333, 27 Sup. Ct. 749 (1907), where a United States soldier who, while on duty, had shot and killed two Filipinos, and had been acquitted by a court-martial, was successful in a plea of double jeopardy before a federal civil court.

[60]31 Fed. 710 (C. C. E. D. Mich. 1887). *See also In re* Fair, 100 Fed. 149 (C. C. D. Neb. 1900).

[61]3 Cold. 85 (Tenn. 1866). See *infra* note 71.

which any order, not showing its illegality on its face, protects the soldier obeying it, the Court stated that:

> . . . the same principle would apply to the acts of a subordinate officer, performed in compliance with his supposed duty as a soldier; and unless the act were manifestly beyond the scope of his authority, or, in the words used in the above case, were such that a man of ordinary sense and understanding would know that it was illegal, that it would be a protection to him, if he acted in good faith and without malice.[62]. . .

Under this case it would seem that the good faith exception which in the law of tort liability is probably limited to emergency situations, is generally applicable in the law of criminal liability for voluntary acts and orders. Here, as in the law of tort liability, conditions of emergency will further extend the field of immunity by widening the scope of lawful discretion,[63] except perhaps in cases involving members of state militias.[64]

2. Acts performed in obedience to military orders

(a) Ordinary conditions—The law of criminal liability for acts committed in obedience to unlawful commands has undergone a development similar to that of the law of civil liability for such acts.[65] The strict rule, denying immunity to the soldier in general, is represented by the case of *United States* v. *Bright*,[66] where the Court held against defendant soldiers who, in obedience to orders, with armed force, had prevented a marshal from serving a writ. In another case the jury had found that defendant, as a sentinel on board a man-of-war, had shot and killed a man on an approaching boat which he had been told to repel. Although he had assumed an order to shoot to kill (he had been given both blank and ball ammunition), the judges found him guilty of murder, though recommending him for pardon.[67] In a case involving the unlawful seizure, by Confederate officers, of persons held under court order, it was said quite generally that "orders of a military commander to his subordinates furnish to the latter no justification," although the subordinate "acts at his peril" in disobeying such orders.[68]

[62]United States v. Clark, *supra* note 60, at 717. *See also* United States v. Carr, 1 Woods 480, 25 Fed. Cas. 306, No. 14,732 (C. C. S. D. Ga. 1872).

[63]See *e.g.* Price v. Poynter, 1 Bush 387, 89 AM. DEC. 631 (Ky. 1867).

[64]See the authorities listed in Note, *Use of Military Force in Domestic Disturbances* (1936) 45 YALE L. J. 879, 893, n. 88; Manley v. State, *infra* note 69.

[65]For a review of the English authorities, see Roberts, *Some Observations on the Case of Private Wallsworth* (1903) 51 AM. L. REG. 63, 161.

[66]24 Fed. Cas. 1232, No. 14,647 (C. C. D. Pa. 1809). *See also* 1 BISHOP, CRIMINAL LAW (9th ed. 1923) § 355; WHARTON, CRIMINAL LAW (12th ed. 1932) § 376.

[67]Rex v. Thomas, 4 M. & S. 442, 105 Eng. Repr. 897 (1815). *See also* United States v. Bevans, 24 Fed. Cas. 1138 No. 14,589 (C. C. D. Mass. 1816).

[68]State v. Sparks, 27 Tex. 627, 633 (1864).

And where defendant militiaman, having received the order to keep people out of a certain inclosure "at all hazards," had killed plaintiff's decedent, the court, while reversing the judgment against defendant on other grounds, reasoned in part that even if the superior officer had "commanded at all hazards, this would not authorize appellant to kill a person, or violate the law, in order to do so. . . ."[69]

A more liberal line of decisions was foreshadowed in Judge Washington's decision in *United States* v. *Jones*,[70] which limited the rule that no military command will "excuse much less justify" an unlawful act, to cases in which the subordinate *knows or ought to know the illegality* of such act. The leading case is that of *Riggs* v. *State*,[71] where the court, holding for defendant on a murder charge, stated the rule as to illegal orders as follows:

> An order given by an officer to his privates which does not expressly and clearly show on its face or in the body thereof its own illegality the soldier would be bound to obey and such order would be a protection to him.

This rule seems to have been generally accepted at least with regard to orders directing the performance of a specific act.[72]

(b) Emergencies—While the older authorities seem to adhere to the original strict rule, even in cases involving emergency situations, the modern lenient rule seems to have been adopted for such situations at an earlier period and to a greater extent than in other cases. Thus as early as forty years ago, in the famous case of *Commonwealth* ex rel. *Wadsworth* v. *Shortall*,[73] in which a member of the state militia on guard duty during a public

[69]Manley v. State, 62 Tex. Crim. Rep. 392, 399, 137 S. W. 1137, 1141 (1911).

[70]3 Wash. C. C. 209, 26 Fed. Cas. 653, No. 15, 494 (C. C. D. Pa. 1813). *See also* Keighly v. Bell, 4 F. & F. 763, 805, 176 Eng. Repr. 781, 800 (1866); 1 STEPHEN, HISTORY OF THE CRIMINAL LAW IN ENGLAND (1883) 206.

[71]3 Cold. 85 (Tenn. 1866). *See also* Despan v. Olney, 1 Curt. 306, 7 Fed. Cas. 534, No. 3,822 (C. C. D. R. I., 1852).

[72]See Notes (1941) 135 A. L. R. 51 with authorities, and ANN. CAS. 1917 C. 8, 27; 36 AM. JUR. (1941) §§ 122, 123. The law of New York is not clear. In Hyde v. Melvin, 11 Johns. 521, 523 (N. Y. 1814), the court held against defendant, captain of the militia, who in violation of a statute had ordered out his company for military duty during an election, overruling the defense of obedience to order which "would only prove the colonel to be equally culpable." See Note (1941) 135 A. L. R. 41, proposing a distinction between orders directing the performance of a specific act and orders directing the accomplishment of a general result. While it is admitted that practically all cases deal with orders of the first class, and that the distinction does not seem to have been urged, it is claimed as "reasonable that, while a specific order might justify an act, a general one which left much to the discretion of the person to whom it was given might not do so, for in the latter case the fear of punishment for disobedience would not exist to the same extent."

[73]206 Pa. 165, 55 Atl. 952 (1903). *See also* Roberts, *Some Observations on the Case of Private Wadsworth* (1903) 51 AM. L. REG. 63, 161.

disorder had shot and killed an innocent man, in obedience to an order to "shoot to kill" anyone failing to halt when so directed, the court discharged the defendant, whose "first duty was obedience" and who, in view of the serious situation, had no ground "for doubt as to the legality of the order to shoot."

While certain courts seem to have gone still further in establishing general immunity for obedience to any superior order, the rule more generally accepted seems to favor a limited immunity, excluding cases of palpable unlawfulness, thus approaching in effect the rule prevailing for all military acts performed in the line of duty.[74]

II. Statutes.

The ideal solution of the problem of soldiers' liability, though at present probably unattainable, would consist of a criminal liability rule exclusively based on a policy of just punishment and effective determent, and a tort liability rule primarily devised to procure indemnification to the injured person. Such indemnification could, according to the general principle of tort law, be based on liability for fault and, where the injuring soldier was without fault or financially irresponsible, on the government's "enterprise" liability[75] for its agents.

The rule of government immunity and the common treatment of criminal and civil liability have prevented, and in all probability will prevent for some time to come, the development of a scheme approaching this solution. The lack of government liability, where such liability would be the most appropriate means to provide indemnification, has caused an over-extension of soldiers' civil liability, which in turn, because of the present interdependence of the law of criminal and civil liability, has produced a criminal liability

[74]See *supra* pp. 189 *ff*. *See also* Despan v. Olney, 1 Curt. 306, 7 Fed. Cas. 534, No. 3822 (C. C. D. R. I. 1852); and State v. Burton, 41 R. I. 303, 103 Atl. 962 (1918), where a United States sailor was held not liable for a violation of the state speed laws committed in obedience to an order, because such order "on its face was one which was justified by the rules of war"; Noted L. R. A. 1918F, 599. *See also* Beckwith-Holland-Bacon-McGovern, *op. cit. supra* note 37, at 66.

[75]See Fairman, *op. cit. supra* note 6, at 313, who seems to favor a solution imposing the burden "upon the public, . . . especially where the wrong is attributable to the misjudgment or inexperience of the military agents whom the government has employed upon difficult duties." This type of "enterprise" liability, serving a loss distribution which under the present law is almost wholly based on a theory of negligence liability, has been discussed by the writer elsewhere as liability for "quasi-negligence." Note, *Loss-Shifting and Quasi-Negligence: A New Interpretation of the Palsgraf Case* (1941) 8 U. of Chi. L. Rev. 729; *Study on Products Liability for Breach of Warranty and Negligence* (1943) Report, Recommendations and Studies of the Law Rev. Comm., 409, 455, n. 320. For a now classic criticism of the present immunity rule, see Borchard, *Government Liability in Tort* (1924) 34 Yale L. J. 1, 3.

of a strictness often violating the most fundamental principles of the penal law.

Remedial legislation, which refrains from modifying the law with regard to either the immunity of the government or the promiscuous treatment of criminal and tort liability, has been limited quite generally to attempts at removing the most conspicuous defects in the application of the common-law rule of military liability: These statutes can be classified according to their primary aim, as (A) securing indemnity to the injured person for his damage, or to the injuring soldier for his liability (indemnity statutes); (B) granting immunity to the soldier (immunity statutes); and (C) offering him procedural protection.

A. Indemnity Statutes

Although any person held liable for acts committed in obedience to orders may seek indemnity against his superior,[76] litigation of this kind seems rare, particularly in military cases,[77] where such redress will of course be discouraged. For this reason and because no remedy is available to the soldier who has been held liable for a voluntary act, only the government can effectively secure the soldier's indemnification, either by assuming the judgment against him,[78] or by reimbursing him for any payment made.[79] Another way to deflect the harsh effect of the present liability rule from the soldier is to grant to the injured person a claim against the government. While this solution has been chosen by many foreign countries,[80] it has found but limited application in this country. The most comprehensive relief based on

[76]See *e.g.* Horrabin v. Des Moines, 193 Iowa 549, 199 N. W. 988 (1924) where a contractor recovered indemnity from city for damages paid by him for a trespass committed at city's request. And in United States v. Buchanan, 8 How. 83, 12 L. ed. 997 (U. S. 1850), the Supreme Court, in an action by the government on defendant purser's bond, while rejecting a set-off claim based on the allegation of obedience to the commodore's orders (because the government is not liable for its agent's torts), conceded that the defendant might have recourse against the commodore. See Note (1924) 38 HARV. L. REV. 397. See also The "Mentor," 1 C. Rob. 179, 181, 165 Eng. *Repr.* 141 (1799): "If a captain made a wrong seizure under the express orders of an admiral, that admiral may be answerable in the damages occasioned to the captain."

[77]See Notes, *Actions Against Military Superiors* (1918) 62 SOL. J. 725 (with authorities), *Remedies against Military Superiors* (1919) 63 SOL. J. 586.

[78]See *e.g.* 10 STAT. 727 (1852).

[79]See *e.g.* 22 STAT. 263 (1882); 5 STAT. 651 (1844). For older instances see The "Actaeon," 2 Rosc. 209, 213 (1815); The "Ostsee," 2 Rosc. 432, 451 (1855).

[80]See the English Injuries in War (Compensation) Act, 4 & 5 Geo. V. c. 30 (1940); CANADA REV. STAT. (1927) c. 132, § 7 (2). During World War I, the existence of a similar statute in Germany was said to be "an interesting reminder that civil courts there, as here, are guided by principles of law, rather than fancied military necessity." Note, *The German Supreme Court and Excessive Military Orders* (1918) 62 SOL. J. 322.

this principle is probably that offered by those United States statutes which authorize the government to pay, up to certain amounts, property damage claims against government "employees" for acts done within the scope of their employment,[81] and by express definition include "enlisted men in the Army, Navy and Marine Corps" as "employees" under these provisions.[82] Even the Federal Torts Claim Bill[83] limits recovery to $7,500 and extends only to non-intentional torts committed by members of the forces within the scope of their duties, not in the course of war activities. In isolated cases states have declared themselves liable for damages done to person or property by members of their militias.[84]

B. Immunity Statutes.[85]

Since no general solution has been found which would give relief to both the soldier and the injured person, most statutes have been limited to mitigating the hardship imposed upon the soldier without regard to the injured person's indemnification. While one group of these statutes provides immunity for military acts in general, others are merely concerned with acts performed in obedience to orders.

By an Act of Congress of March 3, 1863, any right of action was abolished for acts done in suppressing the rebellion under authority of the President.[86] An amendment of May 11, 1866,[87] added immunity for all

[81] 42 STAT. 1066 (1922), 31 U. S. C. § 215, 216 (1940); 54 STAT. 387 (1940), 31 U. S. C. § 223 (1940); 54 STAT. 365 (1940), 31 U. S. C. § 224 (1940); 49 STAT. 1136 (1936), 31 U. S. C. § 224a (1940); 57 STAT. 66 (1943), 31 U. S. C. § 224d (Supp. 1943); 43 STAT. 939 (1940), 31 U. S. C. § 236 (1940); 49 STAT. 1976 (1936), 43 U. S. C. § 315g (1940). *See also* Note, *Liability of the United States and Canadian Governments for Tortious Conduct of Their Military Personnel* (1943) 53 YALE L. J. 188, 192; MILITARY LAWS OF THE UNITED STATES (8th ed. Advocate Gen. of the Army, 1939 with Supp. II, 1943) §§ 701 *et seq.; supra* notes 39 *et seq.* Another important group of indemnity statutes is embodied in the Suits in Admiralty Act [41 STAT. 525 (1920), 46 U. S. C. §§ 741 *et seq.* (1940)] and the Public Vessels Act [43 STAT. 1112 (1925), 46 U. S. C. §§ 781 *et seq.* (1940)] *See also* Note, *Responsibility of the United States on Maritime Claims Arising out of the Operations of Government-Owned Vessels* (1930) 39 YALE L. J. 1189.

[82] 42 STAT. 1066 (1922), 31 U. S. C. § 216 (1940). *See also* the English Military Manoeuvers Act 1897, § 6 providing for government compensation of "any damage to person or property."

[83] H. R. 7236, S. 2690, 76th Cong. 3d Sess. (1940); 86 CONG. REC. 12025 (1940).

[84] A Connecticut statute provides in part as follows:
> The Comptroller is authorized . . . to reimburse in such sum . . . as shall be deemed advisable, any person . . . for damages to person or property caused by the act of an officer or enlisted man of the organized militia in line of duty. . . .

[85] This term is substituted in this paper for the usual "indemnity statutes" (see *e.g.* FAIRMAN, *op. cit. supra* note 6, at 280 *et seq*), to distinguish this group of statutes from those granting indemnification to the injured person or to the soldier. *See also* BECKWITH-HOLLAND-BACON-MCGOVERN, *op. cit. supra* note 37, at 70.

[86] C. 81, § 4; 12 STAT. 755 (1863).

[87] 14 STAT. 46 (1866).

acts done under order of any military commanding officer prior to the passage of the amending act. While the Supreme Court has never passed on the constitutionality of these statutes,[88] the fact that lower federal court and state court decisions have been divided on this point[89] may have prevented the more extensive use of this technique in this country.[90]

A second type of legislation also establishing military immunity for future acts, is that of Section 15 of the New York Military Law, which exempts members of the militia in the service of the state from both civil and criminal liability for any acts done by them in the performance of their duty.[91]

The New York law and all similar statutes, except that of Utah which covers also "members of the militia ordered into the active service of the . . . United States,"[92] merely protect militiamen "ordered into the active service of the State."[93] This clause probably does not include members of the militia serving with the federal forces.[94] The exclusion of such persons from most state immunity statutes is of great importance even in peacetime.[95]

At present, with the militia in war service, the scope of the immunity pro-

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[88]*Cf.* Mitchell v. Clark, 110 U. S. 633, 4 Sup. Ct. 170 (1884) which upheld the limitation of actions against military persons, but did not pass upon the prohibition of actions against persons under military orders. See also FAIRMAN, *op. cit. supra* note 6, at 279, 282 *ff.*

[89]See GLENN, *op. cit. supra* note 6, at 180; WIENER, A PRACTICAL MANUAL OF MARTIAL LAW (1940); Randall, *The Indemnity Act of 1863: A Study in the Wartime Immunity of Governmental Officers* (1922) 20 MICH. L. REV. 589.

[90]*But see* 33 STAT. 2249 (1903) ratifying "all acts of the United States in Cuba during its military occupancy thereof," and thus exonerating officers acting for the United States. O'Reilly de Camara v. Brooke, 209 U. S. 45, 52, 28 Sup. Ct. 439, 441 (1907). *Cf.* 40 STAT. 532 (1918), 5 U. S. C. § 210 (1934) which, while providing for indemnity to inhabitants of allied countries for damages caused by American military forces during World War, expressly declares not to "diminish responsibility of any member of the military forces to the person injured." For a state *ex post facto* immunity statute see the Rhode Island statute applied in Despan v. Olney, 1 Curt. 306, 7 Fed. Cas. 534, No. 3,822 (C. C. D. R. I. 1852). For a history of English legislation see FAIRMAN, *op. cit. supra* note 6, at 280, 281.

[91]As to the constitutionality of this type of provision see *infra* note 149.

[92]UTAH CODE ANN. (1943) tit. 54, C. 1, § 11.

[93]Provisions regarding the state militia are not generally so restricted. See *e.g.* N. Y. MILITARY LAW, §§ 235 [*cf.* State v. Campbell, 40 N. Y. 133 (1869)], 246, 246a, 301.

[94]See Brown v. State, 195 So. 52 (La. App. 1940) where the state was held not liable for negligent driving on duty by a member of the National Guard in federal service. For the converse problem concerning the status of federal army instructors serving with the militia, see WIENER, *supra* note 89, at 41.

[95]See Colby and Glass, *The Legal Status of the National Guard* (1943) 29 VA. L. REV. 839, 846. See in general, Ansell, *Legal and Historical Aspects of the Militia* (1917) 26 YALE L. J. 47; THE MILITIA LAW OF NEW YORK (1862); SCOTT, AN ANALYTICAL DIGEST OF THE MILITIA LAWS OF THE UNITED STATES (1873).

vision seems to be practically limited to the reserve militia and to certain auxiliary bodies acting as state forces.[96]

Military immunity statutes have been enacted in thirty-four states and territories. Alabama, Arkansas, California, Florida, Hawaii, Idaho, Kentucky, Maryland, Nebraska, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, and Virginia have immunity statutes substantially identical with that of New York.[97] North Dakota[98] limits the applicability of the statute to acts done in case of, or to prevent, insurrection, riot or invasion, by so defining the term "active service" for the purposes of this provision. This rule seems to be based on that of the British Riot Act which has been adopted in substance by Connecticut, Georgia, New Hampshire, New Jersey and West Virginia.[99] The Illinois statute[100] further restricts military immunity to criminal prosecution for the killing and wounding of persons in an effort to suppress unlawful assemblies, while Wyoming[101] merely protects members of the State Guard and Kansas and Missouri[102] simply put military persons on the same footing as officers of the peace. Maine and Mississippi,[103] on the other hand, expressly include under their immunity rule acts which, though not having been performed on duty, were done in obedience to the command of a superior (*infra*). Arizona, California and Minnesota immunize the exercise of honest judgment by a commanding officer.[104] The statutes of Montana and Washington deny action against any officer

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[96]See *e.g.* N. Y. MILITARY LAW §§ 5a, 40, 43; Bacon, *The Model State Guard Act* (1941) 10 FORDHAM L. REV. 41; Glass, *National Guard Reserve—Inactive National Guard* (1944) 30 VA. L. REV. 331.

[97]ALA. CODE (1940) tit. 35, § 118; ARK. DIG. STAT. (Pope, 1937) § 9178; CAL. MILITARY AND VETERANS CODE (Deering, 1943) § 392; FLA. STAT. ANN. (1941) § 250.41; HAWAII REV. LAWS (1935) § 7838; IDAHO CODE ANN. (1932) § 45-402; KY. REV. STAT. (1942) § 38.480; MD. ANN. CODE (1939) art. 65, § 51; NEB. COMP. STAT. (1929) §§ 55-150; NEV. COMP. LAWS (Hillyer, 1929) § 7165; N. J. STAT. ANN. (1940) (tit. 38, C. 12-6); N. MEX. STAT. ANN. (1941) § 66-402; ORE. COMP LAWS ANN. (1940) § 103-246 ("while on duty"); R. I. PUBL. LAWS (1939-40) tit. 10, § 202; VA. CODE (1942) c. 106, § 2673 (85). Many states have enacted special privileges regarding the observation of traffic regulations. See *e.g.* ARK. DIG. STAT. (Pope, 1937) § 9285; DEL. REV. CODE (1935) c. 287, § 32. As to exemptions from licensing regulations, see Kennedy, *Military Motor Driving* (1932) 1 S. AFR. T. 150.

[98]N. D. LAWS (1941) c. 221, § 11.

[99]CONN. GEN. STAT. (1930) c. 42, § 801; GA. CODE ANN. (Park, Skillman & Strozier, 1937) § 86-1305; N. H. REV. LAWS (1942) c. 143, § 80; N. J. STAT. ANN. (1939) (Tit. 2, c. 152-6); W. Va. CODE (1943) § 1184.

[100]ILL. ANN. STAT. (Smith-Hurd, 1934) § 197.

[101]WYO. LAWS (1941), c. 63, § 9 (b).

[102]KAN. GEN. STAT. (Corrick Supp., 1941) § 48-512; MO. REV. STAT. (1939) § 15039.

[103]ME. REV. STAT. (1930) c. 18, § 14; MISS. CODE (1930) c. 136 § 5542.

[104]ARIZ. CODE ANN. (1939) § 64-223; CAL. MILITARY AND VETERANS CODE (Deering, 1937) § 336; MINN. STAT. (1941) § 192.27.

or soldier for acts committed in obedience to an order though such order "may hereafter be held invalid by any civil court."[105] Similarly, the Utah statute, though using substantially the same language as the New York statute, merely protects acts done by members of the militia in line of duty in pursuance of orders from a superior authority.[106] Minnesota, Florida and Kentucky, by further limiting the immunity provision to acts done under *lawful* orders *and* in the performance of duty, probably fail to establish an immunity rule different from that of the common law.[107]

Certain civil law statutes applicable to the criminal liability for acts done in obedience to military orders have established a rule of general immunity. While, *e.g.*, the Penal Code for the Philippine Islands absolves of criminal liability only persons acting in obedience to "orders issued by a superior for some *lawful* purpose,"[108] the Penal Code for Cuba and Puerto Rico provides that "he who acts by virtue of obedience due another," is "not delinquent and . . . therefore exempt from criminal liability."[109] And Subdivision 3 of Article 20 of the Preliminary Project of an Italian Penal Code provides that an act is justified as to its penal effects if performed "on an obligatory order of the competent authority" (*per ordine obbligatorio dell' autorità competente*).[110]

It has been pointed out that the *Restatement of Torts* has adopted a *limited immunity* rule for wrongs committed in the execution of orders not manifestly unlawful.[111] While it may be doubted whether this rule represents the prevailing common law rule, several states have embodied a similar rule in their statutory laws and several civil law codes contain provisions to a similar effect concerning acting on orders in general.

A recent Massachusetts statute provides for the criminal and civil immunity of officers and soldiers for acts done or orders given in obedience to orders *"unless the act or order causing such injury was manifestly beyond the scope of the authority of such officer or soldier."*[112] And the Wyoming statute, including all acts "committed in the performance of . . . necessary

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[105]MONT. REV. CODES ANN. (1936) § 1347; WASH. REV. STAT. (Remington, 1932, § 8473.

[106]UTAH CODE (1943) Tit. 54, c. 1, § 11.

[107]MINN. STAT. (1941) § 192.27; FLA. STAT. (1941) § 250.41; KY. REV. STAT. (1942) § 37.260. BECKWITH-HOLLAND-BACON-McGOVERN *op. cit. supra* note 37, at 71, seem to favor an interpretation of all immunity statutes in this sense.

[108]REV. PEN. CODE, PHILIPPINE ISLANDS (1932) art. 11, subd. 6.

[109]Official translation, War Department 1900.

[110]RELAZIONE SUL PROGETTO PRELIMINARE DI CODICE PENALE ITALIANO (1921).

[111]*Supra* note 24.

[112]MASS. LAWS (1939) c. 425 § 1, MASS. ANN. LAWS. (Supp. 1942) c. 33, 24. Italics added.

duties incident to service," limits its immunity rule to acts *"not palpably illegal, excessively violent, or malicious."*[113]

While containing a similar limitation to acts not manifestly unlawful, the following provision of the Penal Code of Costa Rica avoids any difficulty that might arise from the use of the term "illegal." Article 32 of that Code declares he is not responsible for his acts

> . . . who has acted . . . in executing an order of the competent authority as to which he believed or should have believed to be under an obligation to obey.[114]

A similar rule has been adopted by the Mexican law, providing that penal responsibility is excluded where the actor

> obeys a legitimate hierarchical superior, although his order constitutes a crime if such circumstance is not notorious or it is not proved that the accused knew it.[115]

Another intermediate solution between full immunity and full liability has been proposed by Ballantine in his *Draft of a State Military Code*.[116] He suggests, in effect, that a presumption of immunity should be established for acts of militiamen in quelling an insurrection, rebuttable by the proof "that such acts were . . . outside the scope of . . . orders . . . or . . . not done in good faith. . . ."[117]

C. *Procedural Statutes*

1. Jurisdictional privileges.

Several jurisdictions, not limiting themselves to granting immunity for military acts, either, like the District of Columbia and Louisiana[118] prohibit generally the prosecution of militiamen for acts done on duty, or, like Indiana and Michigan[119] only for acts done in obedience to orders.

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[113]WYO. LAWS (1941) c. 63 § 9(b). Italics added.

[114]Own translation from CODIGO PENAL DE LA REPUBLICA DE COSTA RICA (ed. Hermanos, 1924), art. 32.

[115]COMPENDIUM OF THE LAWS OF MEXICO (Transl. Wheless, 2d ed. 1938) art. 996, subd. 7. *See also* the pre-nazi GERMAN MILITARY PENAL CODE § 47 (2), *infra* note 192; and § 17 of the Draft of a Civil Wrongs Bill, prepared for the Government of India; POLLOCK, TORTS (13th ed. 1929) 633.

[116]Draft of a State Military Code for the Government of the Organized Mititia in their Relations with Civilians, proposed by Henry W. Ballantine, *Qualified Martial Law, A Legislative Proposal* (1916) 14 MICH. L. REV. 102, 118, 197, 213.

[117]*Id.* at 118, § 13. On the other hand, this code would expressly provide not only that members of the militia are responsible to the civil courts (*Id.* at 215, § 5), but that a special military board shall inquire into any wrong done to civilians and impose and enforce reparation (*Id.* at 217, §§ 3, 4).

[118]D. C. CODE (1940) Tit. 118, § 39-705; LA. GEN. STAT. (Supp. 1942) § 4505.31.

[119]IND. STAT. ANN. (Burns, Supp. 1943) § 45-1202; MICH. STAT. ANN. (Fiske, Supp. 1942) § 4.633. *See also* BRITISH ARMY ACT, § 144.

In addition, most jurisdictions have enacted statutes exempting members of their forces from civil process.[120]

Article 74 of the Articles of War exempts soldiers to some extent from civil jurisdiction "in time of war"[121] and both Congress and state legislatures have, in soldiers' civil relief acts, established various other procedural privileges.[122] Moreover, under Article 117 of the Articles of War[122a] "any civil or criminal prosecution . . . against any . . . person in the military service of the United States on account of any act done under color of his office or status" may be removed into the federal district court.

2. Public defense.

Many states have, in various ways, made provision for the defense at public expense of members of their militia in actions or prosecutions for acts done on duty: California, Maine, Montana, New Jersey, Oklahoma and South Dakota provide for defense by a state officer,[123] while under the statutes of Minnesota, Rhode Island, Nevada and Wisconsin the governor will appoint private counsel for the defense.[124] Only the South Dakota statute requires the defendant to refund the costs paid by the state upon collection of the judgment.[125]

3. Security for costs.

At least nineteen states (Arkansas, California, Idaho, Maine, Maryland, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New

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[120]See *e.g.* N. Y. MILITARY LAW § 235; ALA. CODE (1940) tit. 35, § 106; ARK. DIG. STAT. (Pope, 1937) § 9282; COLO. STAT. ANN. (Michie, Supp. 1942) c. 111; GA. CODE ANN. (Park, Skillman & Strozier, 1937) § 86-702; DEL. REV. CODES (1935) c. 287, § 32. For a recent synopsis and discussion of other exemptions from civil process in New York statutes, see Family Fin. Co. v. Starke, 36 N. Y. S. (2d) 858 (Sup. Ct., Sp. T., N. Y. Co. 1942). See also *The War Power and the Government of Military Forces* (1916) 7 J. CRIM. L. & CRIMIN. 246, 405, 555, 414 *et seq;* Note, *Service of Process on Members of the Armed Forces* (1941) 36 ILL. L. REV. 364.

[121]41 STAT. 803 (1920), 10 U. S. C. § 1546. (1940). As to the "middle of the road policy" observed in practice, see Monroe, *When a Soldier Breaks the Law* (1942) 33 J. CRIM. LAW AND CRIMIN. 245, 249.

[122]For a recent discussion see *e.g.* Skilton, *The Soldiers' and Sailors' Civil Relief Act of 1940 and the Amendments of 1942* (1942) 91 U. OF PA. L. REV. 177. *See also* Schmehl, *Soldiers' and Sailors' Civil Relief Act of 1940: A Survey and Bibliography of Books, Articles and Cases* (1942) 35 L. LIB. J. 187.

[122a]41 STAT. 811 (1920), 10 U. S. C. § 1589 (1940).

[123]CALIFORNIA MILITARY AND VETERANS CODE (Deering, 1937) § 393; ILL. REV. STAT. (St. B. A. 1943) c. 129, § 201; ME. REV. STAT. (1930) c. 12. § 14; MONT. REV. CODES ANN. (Anderson & McFarland, 1935) § 1347; N. J. STAT. ANN. (1940) tit. 38, c. 12-7; OKLA. STAT. ANN. c. 4, tit. 44, § 212; S. D. CODE (1939) § 41.0181.

[124]MINN. STAT. (1941) § 192.28; R. I. LAWS (1939-40) c. 350, tit. 10, § 203; NEV. COMP. LAWS (Hillyer, 1929) § 7165; WIS. STAT. (1941) § 21.14.

[125]S. D. CODE (1939) § 41.0181.

York, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Washington and West Virginia) require the plaintiff, in any civil or criminal[126] action against a soldier or officer for any act done on duty, to file security for the payment of costs.[127] In West Virginia the right to security is conditioned upon its being made "to appear to the court by affidavit or otherwise" that the act was one done on duty.[128] Several states have established minimum amounts for the required security ($100 in California and Oklahoma; $200 in Montana and Washington; $500 in West Virginia).[129]

4. Treble costs.

As a further protection against unjustified claims, the statutes of nine states (Idaho, Maryland, New Jersey, New Mexico, New York, North Dakota, Oregon, Rhode Island and West Virginia) give treble costs to the successful defendant soldier.[130] South Dakota imposes a penalty of double costs and such additional attorneys' fees as the court shall allow,[131] while Great Britain and New Zealand only permit the recovery of reasonable costs.[132] The justification of the institution of multiple damages and costs in general in a modern legal system has been discussed elsewhere.[133]

5. Pleading military privilege after general denial.

The statutes of at least nine states (California, Maine, Maryland, New Hampshire, New Mexico, New York, Oregon, Rhode Island, West Virginia)[134] and of New Zealand[135] contain a peculiar procedural privilege. Under

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[126]See *e.g.* N. Y. MILITARY LAW § 15, which gives the right to require security for costs in "an action or proceeding of any nature," thus apparently including criminal actions. See N. Y. CODE CRIM. PROC. §§ 5, 119, 720; O'Connor v. Walsh, 83 App. Div. 179, 183, 82 N. Y. Supp. 199 (2d Dep't 1903); 11 CARMODY'S NEW YORK PRACTICE (1931) § 158. § 15 may also permit the imposition of costs upon complainants or private prosecutors before the magistrate. People v. Kranz, 63 Misc. 146, 118 N. Y. Supp. 499 (Co. Ct., Chautauqua Co. 1909); 2 BISHOP'S NEW CRIMINAL PROCEDURE (1913) 543 f.

[127]See *supra* notes 97 *et seq.*; WASH. REV. STAT. ANN. (Remington, 1932) § 8473; W. VA. CODE ANN. (Michie, 1943) § 1191.

[128]W. VA. CODE ANN. (Michie, 1943) § 1191.

[129]*Supra* note 123.

[130]*Supra* notes 97 *et seq.* In New York, this rule which dates back to REV. STAT. (1829) c. X, tit. IX, § 6, was interpreted in Walker v. Burnham, 7 How. Pr. 55 (N. Y. 1852) to apply to defendant civilians acting under military orders.

[131]*Supra* note 125.

[132]BRITISH ARMY ACT, § 144; NEW ZEALAND ARMY ACT § 94 (3).

[133]Study, *Multiple Damages* (1944) REPORT, RECOMMENDATIONS AND STUDIES OF N. Y. LAW REV. COMM.

[134]*Supra* notes 97 *et seq.*

[135]NEW ZEALAND ARMY ACT, § 94 (2).

a general denial the defendant may introduce only such evidence as will contradict what the plaintiff is bound to prove to make out his case.[136] Since acting on duty would probably be considered as an affirmative matter and, therefore, as not provable by plaintiff, the defendant militiaman could not prove this fact under a general denial except under an express statutory provision. In fact, the statutes of the above-mentioned jurisdictions expressly grant the privilege that a defendant militiaman "in all cases may make a general denial and give the special matter in evidence."

III. The Problem

A. Summary and Controversy

The present state of the law can perhaps be summarized as follows: The common law of military liability is applicable to members of the armed forces of the United States and to those militiamen whose states have not enacted immunity statutes. Older authorities rarely deviated from the stringent principle of full liability for illegal acts, with regard to either civil or criminal liability, whether such acts were committed under order or voluntarily, under ordinary conditions or in emergencies.[137] A more recent tendency seems to develop a rule of immunity for acts committed in good faith, a rule which in civil cases may be limited to emergency situations and to acts committed in obedience to "apparently" valid orders. In derogation of the common law rule the militia statutes of most states have completely or partly immunized members of the militia for acts performed on duty.

Literary discussions evaluating judicial and lay opinions on the question of military liability are scarce. In favor of a rule of full soldier's *immunity* it is usually claimed that a legal rule holding the soldier liable for acts done in compliance with unlawful orders will create undue hardship to the soldier and undermine military discipline. Under such a rule the soldier will have to choose, in cases of doubt, between disobeying the order, thus exposing himself to severe military punishment and turning every camp into "a debating school,"[138] and obeying the order at his peril in precarious reliance on "a possible indemnity from a benevolent legislature or a pardon from a sympathetic pardoning power."[139] The injustice of this rule is

[136]See 3 Carmody's N. Y. Practice (1931) § 983.

[137]It has been pointed out, however, that the existence of an emergency may determine the scope of permissible discretion as well as the assumption of a state of coercion. For jurisdictions limiting statutory immunity to certain emergency situations, see *supra* notes 98, 99, 100.

[138]McCall v. McDowell, 1 Abb. 212, 15 Fed. Cas. 1235, No. 8,673 (C. C. D. Cal. 1867).

[139]Ackerly, *Legal Responsibility of Obedient Soldier or Militiaman* (1916) 22 Case

not outweighed by a corresponding interest of the injured person who may obtain satisfaction from the really responsible officer[140] or from the government. Nor are these objections removed by those decisions and statutes which deny liability for acts performed in obedience to orders not clearly illegal. Even such limited liability would impair strict obedience and, besides, would depend upon the varying judgment of particular courts and juries. Moreover, even obedience to a palpably illegal order may be excusable if compelled.

The adherents of a rule of *full liability,* on the other hand, insist that immunity "would be subversive of civil liberty and would place the military before the civil power."[141] Thus Owen J. Roberts, now Associate Justice of the Supreme Court of the United States, concluded his much-cited article on the case of Private Wadsworth with the warning that when "you make a rule that orders justify, you paralyze the arm of the civil law, and render it possible to cloak the vilest abuses of power under the pretence of a superior's commands."[142]

The intermediate "palpable unlawfulness" rule of the *Restatement of Torts*[143] would satisfy the adherents of the present system of full liability no more than the advocates of an immunity rule. It is claimed that this rule is not only too uncertain in application but unjust with regard to both the defendant and the plaintiff. It is unjust with regard to the defendant in exempting subordinates of supernormal understanding and discriminating against those of subnormal understanding; and it is unjust with regard to the plaintiff in requiring him, possibly by a chain of unsuccessful suits, to ascertain the officer originally responsible for the unlawful order or act, while he could prosecute his claim against the subordinate without "any appreciable injury to the public service."[144] Uncertainty has also been stressed as an argument against similar proposals regarding soldier's crim-

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AND COMMENT 739, 743. *See also* Turney, *Civil and Criminal Accountability of Members of the Army and Navy* (1917) 24 CASE AND COMMENT 297, 300.

[140]McCall v. McDowell, 1 Abb. 212, 15 Fed. Cas. 1235, No. 8,673 (C. C. D. Cal. 1867). *See also* WIENER *op. cit. supra* note 89, at 151: "colonels are more solvent than privates."

[141]J. G. White (1917) 24 CASE AND COMMENT 499. *See also* Ballantine, *The Effect of War on Constitutional Liberty* (1917) 24 CASE AND COMMENT 3; Brown, *Military Orders as a Defense in Civil Courts* (1917) 8 J. CRIM. L. AND CRIMIN. 190. *See also* Brown, *Military Order as a Defense in Civil Courts* (1918) 3 VA. L. REV. 641. This argument has been refuted as "unfair and unreasonable" in view of age-old experience with the judiciary which has never abused its immunity.

[142]Roberts, *op. cit. supra* note 65, at 174.

[143]*Supra* note 24. This rule is advocated in Note, *Civil Liability of Soldiers Obeying Commands of Superior Officers* (1911) 59 U. OF PA. L. REV. 646.

[144]Brown, *op. cit. supra* note 141, at 192.

inal liability. Moreover, it is feared that much undesirable immunity would be produced under such a rule by the difficult provability of oral orders, as well as by the prohibitions against self-incrimination and against conviction in cases of reasonable doubt.[145]

Adherents of full soldiers' liability are generally satisfied with considering any resulting hardship as "one of the risks of the business"[146] or with the expectation that such hardship will be removed in civil cases by the soldier's right to reimbursement by his superior officer or by his government, and in criminal cases by *nolle prosequi* and pardon.[147]

B. Analysis and Possible Solution

Statutory action can probably not be expected in the near future and would, in view of possible constitutional and political objections,[148] be likely to increase rather than alleviate present difficulties. Moreover, such action

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[145]Brown, *op. cit. supra* note 141, at 205. *See also* FAIRMAN, *op. cit. supra* note 6, at 309 *et seq.*; Garner, *Punishment of Offenders against the Laws and Customs of War* (1920) 14 AM. J. INT. L. 70, 85.

[146]2 LOWELL, THE GOVERNMENT OF ENGLAND 491, as quoted by WIENER, *op. cit. supra* note 89, at 144.

[147]WIENER, *op. cit. supra* note 89, at 150, stressing the analogy of this situation with the historical solution of the problem of self-defense (reason for clemency rather than justification).

[148]Since the liability of federal soldiers and of militiamen in federal service should be uniform and independent from peculiarities of the law of the state of involuntary residence, federal legislation would seem desirable. Such legislation would probably be held constitutional as corresponding to the Soldiers' and Sailors' Civil Relief Act of 1940, 54. STAT. 1178 *et seq.* (1940) § 50 U. S. C. APP. §§ 501 *et seq.* (Supp. 1943) which purport to relieve members of the forces "in order to provide for, strengthen and expedite the national defense" and "to enable such persons to devote their entire energy to the defense needs of the Nation." *Id* at 1179, 50 U. S. C APP. at § 510. While under such federal legislation the regulation of the status of militiamen acting as State troops would have to be left to the states, state regulation would probably follow any established federal pattern. If the law of tort and criminal liability of all soldiers should be deemed, however, to be within the exclusive competence of the several states, only uniform acts could avoid the creation of new difficulties.

The constitutionality of state immunity statutes with regard to possible discrimination has been rarely passed upon. The only New York case discussing the question did not decide it. McLaughlin v. Kipp, 82 App. Div. 413, 81 N. Y. Supp. 896 (2d Dep't, 1903). *See also* Schroedel v. Bullard, 243 App. Div. 800, 278 N. Y. Supp. 12 (2d Dep't, 1933); Carmody v. Davis, 241 App. Div. 88, 270 N. Y. Supp. 11 (2d Dep't 1934). For decisions from other jurisdictions, see O'Shee v. Stafford, 122 La. 444, 47 So. 764, 765 (1908), where the court, with regard to an immunity statute similar to that of New York, denied the intention of the lawmaker "to exempt superior officers from civil responsibility for torts, and to deny to the citizen for injury done him 'adequate remedy by due process of law,' in plain contravention of article 6 of the state Constitution." In Bishop v. Vandercook, 228 Mich. 299, 200 N. W. 278 (1924), it was held that the Michigan statute providing that "troops . . . shall be privileged from prosecution by the civil authorities, except by direct order of the governor, for any acts or offenses alleged to have been committed while on . . . service" would be unconstitutional if excluding civil accountability.

may be dispensable and even undesirable in view of the unmistakable common-law trend towards a new liability rule satisfying most criticisms of the present law.

In the field of criminal liability the defenses of mistake of fact and coercion, together with jury leniency and a broader interpretation of lawful discretion, may gradually transform the present theory of full liability for wrongful acts performed on duty into a theory of immunity limited by a liability for palpably unlawful acts performed without coercion.

The common-law principle of full civil liability of soldiers is likely to persist until federal and state governments succeed in safeguarding the injured civilians' interests by the recognition of their liability for the "dangerous enterprise" of military action. Assumption of judgment by the state, liability under *respondeat superior* and public defense are steps in this direction. But while the balance of interests will, until such time, support the classic rule of full liability, such balance may be upset in the soldier's favor in cases of emergency and coercion, or in the injured person's favor in cases of double recovery.

Although it is believed that most of the principles which, in the light of the conclusions arrived at in this paper, should determine the law of soldiers' liability, are being and will be adopted as common law, these principles will, for the sake of consistency and completeness, be presented in a scheme of liability rules which probably could be fully realized only by statute.

1. Persons liable.

The limitation of immunity rules to militiamen is indefensible both from the defendant soldier's and the plaintiff civilian's standpoints. If the militiaman has been immunized because of the emergency character of his service,[149] such reason now obviously applies to an incommensurably higher degree to federal soldiers.[150] The injured person is left entirely without a remedy if injured by a militiaman, while if injured by a federal soldier, he may have two claims—one against such soldier and, in certain property

[149]See Note, *Homicide by Soldiers* (1916) 27 AM. L. NEWS 7; ANN. Cas. 1914A 867. But militias have also been used for peaceful purposes, as *e.g.*: to compel a city council to discriminate against negroes [Allen v. Oklahoma City, 175 Okla. 421, 52 P. (2d) 1054 (1935)] to remove a state highway commissioner [Hearon v. Calus, 178 S. C. 381, 183 S. E. 13 (1935)], indeed, to control oil production [Sterling v. Constantin, 287 U. S. 378, 53 Sup. ct. 190 (1932)]. *See also* N. Y. MILITARY LAW, §§ 111, 112.

[150]The American soldier overseas remains subject to American law. See *infra* note 197.

damage cases at least, another claim against the federal government.[151] Any statutory reform of soldiers' liability should, therefore, establish equality between federal and state soldiers. The question, how far civilian defense workers should be included in such regulation, would seem to require extensive factual study.[152]

2. Theory of liability.

Both the rule of the common-law liability of federal soldiers and that of the statutory immunity of militiamen have proved unsatisfactory, the first rule because it imposes undue hardship upon the soldier and impairs military discipline, the second rule because it deprives the injured person of his remedies and endangers civilian liberties. The principal difficulty in devising a solution is caused, it is submitted, by the treatment of both criminal and civil liability under one rule. If the distinct policies which govern these liabilities and which under the present law have found expression chiefly in inconsistent results based on a varying evaluation of evidence, were embodied in two independent rules of law, they could probably contribute much to a general solution of the problem.

(a) Criminal liability—While rules of civil liability are largely determined by the interests of the injured person, such interest may be disregarded in formulating a rule of criminal liability,[153] which should be fully based on a theory of punishment. Under such a theory a wrongful act committed in obedience to a military order or otherwise in the line of duty will, as a rule, appear excusable chiefly in two situations:

(1) The soldier seems free of punishable guilt where he could reasonably assume that the order obeyed was legal or that he was otherwise under a duty to act. In jurisdictions not recognizing the "palpable unlawfulness" rule, the doctrine of mistake of fact or, indeed, that of mistake of law,[154]

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[151] *Supra* notes 81 *et seq.*

[152] At least one state has enacted an immunity rule granting protection to civilian defense workers similar to that granted to members of the armed forces. IND. STAT. ANN. (Burns, Supp. 1943) § 45-1513 provides in part that no "civilian defense worker or member of any agency engaged in any civilian defense activity . . . shall be liable for the death of or injury to persons, or for damage to property, as a result of any such activity." Civilians serving "with" the armed forces have in various other respects been subjected to the same rules as soldiers. See *e.g.* REPORT, RECOMMENDATIONS AND STUDIES OF THE N. Y. LAW REV. COMM. (1943) 327 *et seq.* regarding military acknowledgments and proofs.

[153] See UNITED STATES ARMY RULES OF LAND WARFARE, BASIC FIELD MANUAL FM 27-10 (1940) § 347, *infra* note 191.

[154] The wider application of the defense of mistake of law has recently been urged by Hall and Seligman, *Mistake of Law and Mens Rea* (1941) 8 U. OF CHI. L. REV. 641, in cases where "there has been misleading conduct for which the state should fairly be held responsible" (*Id* at 683), in particular also "when officials in the execu-

literally applied would furnish the common law basis for a more general recognition of this defense, which so far has been largely limited to extra-judicial utterances.[155]

(2) The soldier should be free of responsibility when he acted under circumstances amounting to duress or coercion, *i.e.* where other conduct could not reasonably be expected from him.[156]

While the doctrine of coercion has not been generally accepted in this field, certain indications pointing in this direction may be found in judicial decisions and legislative acts as well as in legal writings. It has been stated as a general proposition that coercion will excuse "for committing most, if not all crimes except taking the life of an innocent person."[157] Broad statements like this have, however, been limited to digests, annotations and textbooks,[158] and have found judicial recognition only rarely,[159] and only in cases of a justified fear of death or grievous harm.[160] In this form the defense of coercion has also become a part of the statute law of several states.[161]

Something like a general theory of coercion seems to be recognized only for the wife acting under the husband's order and for the child acting under

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tive department have led the defendant to believe (erroneously) that certain conduct is not illegal" (*Id* at 675). *See also* KENNY, OUTLINES OF CRIMINAL LAW (1933) 72. For an example of the progress of the theory of relief against mistake of law even in civil law fields see *Act, Recommendation and Study relating to Restitution of Money Paid Under Mistake of Law* (1942) REPORT, RECOMMENDATIONS AND STUDIES OF THE N. Y. LAW REV. COMM. 27 *et seq.*

[155]See Lord Haldane in his testimony before the Select Committee on Employment of Military in Cases of Disturbances, 7 Parl. Papers (1908) No. 236, p. 12, as *quoted* by FAIRMAN, *op. cit. supra* note 6, at 310; Brown, *supra* note 23, at 206 *et seq.;* BISHOP, *op. cit. supra* note 126, at § 303.

[156]See EHRENZWEIG, MISTAKE AND UNLAWFULNESS (IRRTUM UND RECHTSWIDRIGKEIT) (Vienna, Manz 1931), ZENTRALBLATT (1930) Nos. 10, 11, note 158; EHRENZWEIG, TORT LIABILITY FOR FAULT (SCHULDHAFTUNG IM SCHADENERSATZRECHT) (Vienna 1936) 246 *et seq.*

[157]Note (1922) 16 A. L. R. 1470.

[158]See *ibid.;* Note (1904) 106 AM. ST. REP. 721; 8 R. C. L. (1929) 125, § 100; WHARTON, CRIMINAL LAW (12th ed. 1932) § 384.

[159]See WHARTON, *id.* at 514, n. 21; STEPHEN'S DIGEST ON CRIMINAL LAW, art. 31, quoted in People v. Repke, 103 Mich. 459, 471, 61 N. W. 861 (1895). *Cf.* M'Growther's Case, Foster's Crown Law, 13; Arp v. State, 97 Ala. 5, 12 So. 301 (1892), expressly rejecting the defense of compulsion.

[160]See *e.g.* People v. Repke, *supra* note 159. *Cf.* WHARTON, *op. cit. supra* note 158, at 516, pointing out that "it would be a most dangerous rule if a defendant could shield himself from prosecution for crime by merely setting up fear from or because of a threat of a third person."

[161]See *e.g.* CAL., PEN. CODE (Deering, 1937) § 26 (8) providing that persons are incapable of committing a crime (except a capital crime) "who committed the act . . . under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused." *See also* P. R. PEN. CODE (1937) § 39 (10); CANAL ZONE CODE (1934) § 57 (j).

the father's order. Thus it has been held that a wife is not liable for a tort or minor felony committed in the presence and by the direction of her husband.[162] While the position of the wife has become doubtful in view of the changes which have taken place during the last decades in the general legal position of women, it may still be considered as the prevailing law that a child may be excused for a crime committed by him in such circumstances.[163]

The applicability of the theory of coercion to crimes committed by soldiers at the command of their superiors has hardly ever been discussed.[164] The following dictum in the leading case of *McCall* v. *McDowell*[165] seems to have remained unnoticed:

> . . . If the law excuses the wife on the presumption of coercion, for what reason should it refuse a like protection to the subordinate and soldier when acting in obedience to the command of his lawful superior? The latter may be said to act—particularly in time of war—under actual coercion. . . . The certain vexation and annoyance, together with the risk of professional disgrace and punishment which usually attend the disobedience of orders by an inferior, may safely be deemed sufficient to constrain his judgment and action, and to excuse him for yielding obedience to those upon whom the law has devolved both the duty and responsibility of controlling his conduct in the premises.

The only case that could be found which actually applies a theory of coercion in a case of military obedience is that of *Clark* v. *State*.[166] In that case the Georgia court held that a soldier of the Confederate army was not responsible for burning a house at the order of his superior, because "obedience or death are the alternatives in military government in such cases. . . . the subordinate almost always acts under coercion; his acts are the acts of others for which in the clear light of common sense, he cannot be held answerable. . . ."

In view of the scarcity of authority, it may be considered as significant

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[162]Cassin v. Delaney, 38 N. Y. 178 (1868). *See also* KENNY, *op. cit. supra note* 154, at 73.

[163]See Note (1922) 16 A. L. R. 1470.

[164]*Ibid.* The note discusses the relation of commanding officer and soldier besides those between parent and child, husband and wife, and employer and employee, but does not cite a single case discussing the question from the angle of coercion. However, isolated remarks indicating similar considerations may be found. See *e.g.* Note, *Liability for Torts of Military Personnel* (1942) 55 HARV. L. REV. 651, 654, enumerating among "the factors in deciding whether a subordinate is reasonable in obeying the command of a superior," also "the severity of the punishment a court-martial can impose."

[165]1 Abb. 212, 15 Fed. Cas. 1235, No. 8,673 (C. C. D. Cal 1867).

[166]37 Ga. 191 (1867).

that a recent federal case seems to assume a rule recognizing immunity on grounds of compulsion in cases involving military orders. In *Guigni* v. *United States*,[167] the captain and the crew of an Italian tanker were convicted of having violated a federal statute, which prohibits the injuring of vessels engaged in foreign commerce,[168] by intentionally damaging the main engine of their ship after Italy had entered the war. The court affirmed the judgment denying *inter alia* "immunity to the officers and crew on the ground that they obeyed the orders of their employer through his agent, the captain," because "anyone who wished could have escaped ashore and sought sanctuary with the authorities, had he been so inclined, and thus escape coercion."[169]

Since this theory is hardly borne out by American authority, it may be permissible to trace it, partly at least, to foreign sources. It should be noted that most European laws, while denying general immunity to one committing military acts in obedience to orders on grounds similar to those of the American courts,[170] have recognized a defense of coercion. Thus it is said in the leading treatise on French criminal law that:

> ... if the subordinate may fear to lose his life or his liberty by his refusal to obey, he will be in a state of coercion and will be permitted to invoke irresistible force.[171]

Similar statements will be found for the German and Austrian law. The recognition, by English as well as American writers, of the theory of com-

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[167]127 F. (2d) 786 (C. C. A. 1st, 1942).

[168]40 STAT. 221, 231 (1917), 18 U. S. C. § 502 (1940).

[169]Guigni v. United States, 127 F. (2d) 786, 791 (C. C. A. 1st, 1942).

[170]See *e.g.* GARRAUD, PRÉCIS DE DROIT CRIMINEL (14th ed. 1926) 291 *et seq.* stating that under French criminal law "an order from a civil or military superior cannot justify an illegal act," while it is "reason for *excuse* where it has led the subordinate to believe that he has not committed a crime," and while his punishment may be mitigated even in cases in which he "is aware of being an instrument for a crime." *See also* HUGUENEY, DROIT PÉNAL ET PROCÉDURE PÉNAL MILITAIRES (Paris, Sirey 1933) 396. *See also* AUSTRIAN PEN. CODE (pre-national-socialist) §§ 535, 560-b under which the order of a military superior does not exclude responsibility for criminal acts, while disobedience of an unlawful order is free of military sanctions. But *cf.* Sack, *Punishment of War Criminals and the Defense of Superior Order* (1944) 60 L. Q. REV. 63, who assumes that in "Europe" obedience to orders is generally a defense. For Italian law see in general BETTIOL, L'ORDINE DELL'AUTORITA NEL DIRITTO PENALE. An excellent survey and discussion of South-American Laws will be found in TEJERA, LA DESOBIENCIA (1933) 93.

[171]GARRAUD, *op. cit. supra* note 170, at 292. As to the application of the compulsion provision of § 64 of the FRENCH CODE to crimes committed by enemy soldiers, see Mérignhac, *De la Sanction des Infractions en Droit des Gens* (1917) 24 RÉVUE GEN. DE DROIT INT. PUBL. 5, 53; Nast, *Les Sanctions Pénales de l'Enlèvement par les Allemands du Materiel Industriel* (1919) 26 RÉVUE GEN. DE DROIT INT. PUBL. 11, 123.

pulsion with regard to the punishment of enemy soldiers under international law, seems particularly significant.[172] It may be assumed that even the rule of the British Manual and the United States Rules of Land Warfare which deny the responsibility of soldiers for acts committed in obedience to orders, is based on a theory of compulsion.[173]

The principles just developed can be embodied in a statute in one of two ways: either by the recognition of the defenses of reasonable mistake and coercion, under a rule preserving the present common-law principle of full liability, or by the adoption of a principle of general immunity limited by the absence of reasonable mistake and coercion.[174] Malice as such should probably not produce liability under either solution.[175]

No special rule seems needed for negligent conduct where such conduct consists of the negligent execution of a lawful order. Such order, of course, cannot excuse. Where, on the other hand, the negligent conduct as such (*e.g.* driving at an excessive rate of speed or against a red light) was ordered by the superior, such conduct would be covered by any general immunity rule.[176]

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[172]See *e.g.* LAMMASCH-RITTLER, LEHRBUCH DES OESTERREICHISCHEN STRAFRECHTS (1933) 94, 170 (adding fear of loss of property); 1 LISZT-SCHMIDT, LEHRBUCH DES DEUTSCHEN STRAFRECHTS (26th ed. 1932); BIENENFELD, HAFTUNGEN OHNE VERSCHULDEN (Vienna, 1933) 356, n. 12 with exhaustive references. *See also* KENNY, *op. cit. supra* note 154, at 71. For the international law see Pollock, *The Work of the League of Nations* (1919) 35 L. Q. REV. 193, 198; Eagleton, *Punishment of War Criminals by the United Nations* (1943) 37 AM. J. INT. L. 495, 497.

[173]See *infra* notes 194 *ff.* OPPENHEIM, INTERNATIONAL LAW (1-5th ed.) § 253, one of the co-authors of the rule of the Manual, gives the following rationale for the similar statement in his textbook: "The law cannot require an individual to be punished for an act which he was compelled by law to commit."

[174]This rule would be related to, though not identical with, the principle of "palpable unlawfulness" embodied in the statutes of Massachusetts and Wyoming, *supra* notes 112, 113. A further limitation of the immunity rule could be achieved by the substitution of a subjective standard for the objective standard of these statutes. It might also be desirable expressly to state in the statute the circumstances which would determine the standard of reasonableness (such as the existence of an emergency).

[175]See *supra* notes 50 *et seq.* Military discipline would seem sufficient to cope with cases of this kind.

[176]The following is a draft statute for the criminal liability of soldiers which would seem adaptable for the general part of any state criminal code:

> Military immunity. A member of the armed forces of the United States or any of the several states or territories or the District of Columbia shall not be liable criminally for any act done or order given in the performance of his duty, except if he knew or should have reasonably known that such act or order was unlawful; nor shall such person be liable for any act done or order given in obedience to an order, disobedience to which, in his reasonable belief, would have endangered his personal safety or liberty.

[Presumptions as to reasonableness of knowledge and belief in defendant's favor may be added for wrongs committed in emergencies.]

It might be argued that a rule of liability, based on a concept of acting within the

(b) Civil liability—It has been pointed out that any statutory or common-law scheme of soldiers' civil liability will, in the absence of a system of complete government indemnification for damage inflicted by the military, have to resign itself to attempts at balancing the conflicting interests of the soldier, who under a rule of full liability would face the dilemma between submission to military or civil penalty, and the injured person, who under an immunity rule would be deprived of his sole remedy. While the present common-law rule of liability can probably be justified by the prevailing interest in civilian security in peacetime, the balance of interests would seem to require the opposite solution in several situations: (1) where the wrong was committed in conditions of emergency (battle and insurrection); (2) where the soldier acted in obedience to an order under circumstances amounting to coercion; (3) where the injured person is able to recover (a) from the person giving the unlawful order, or (b) from the government (under a general or special indemnity statute).[177]

3. Problems of conflict of laws and international law.

(a) Forces of sister state—Under the military laws of most states the immunity provision seems to be applicable also where the wrong was committed outside such states.[178] Similarly, it can be assumed that wrongs committed by federal soldiers on foreign soil are governed by American common law.[179] It is highly doubtful, however, in the absence of express

scope of duty, might invite interpretation similar to that of the "scope of employment" doctrine of the law of *respondeat superior*. See *e.g.* Y. B. Smith, *Frolic and Detour* (1923) 23 COL. L. REV. 444. In fact, while the results in these situations are directly opposite (grant and denial of remedy), interpretation of the "military duty" concept with the help of this analogy was used only recently in the case of Kurnath v. State, 130 N. J. L. 87, 30 A. (2d) 892 (1943). Compensation under the Militia Compensation Law was denied to a member of the New Jersey National Guard, injured in an automobile accident while returning to camp, because he was not injured "while on duty or as the result of exposure incident thereto," these statutory words being interpreted as similar words had been interpreted under the Workmen's Compensation Act. See in general Note (1944) 150 A. L. R. 1456.

[177]The following is a draft statute for soldiers' civil liability which takes as its starting point the wording of the militia laws granting full criminal and civil immunity to members of the state militia. *Supra* notes 91, 97.

Relief from civil liability. A member of the armed forces of the United States or any of the several states or territories or the District of Columbia shall not be liable civilly for any act done or order given in obedience to an order, disobedience to which, in his reasonable belief, would have endangered his personal safety or liberty. Nor shall such person be liable if and in so far as the person injured by his act or order has a claim for indemnification against a government under any public or private act.

[178]See *e.g.* N. Y. MILITARY LAW § 114.

[179]See Cohn, *The Problem of War Crimes To-day* (1941) 26 TRANSA. OF THE GROTIUS SOC. 125, 132; Hyde, *Punishment of War Criminals* (1943) PROCEEDINGS OF THE AM. SOC. OF INT. L. 39, 56; Wright, *id.* at 56. *See also* U. S. RULES OF LAND WARFARE,

statutory provisions, what law applies to members of the militias of sister states who commit a wrong within the host state, either while engaged in legitimate fresh pursuit[180] or while occupied in that state at the request of its governor.[181]

(b) Allied forces—The situation of allied forces is different from that of members of the forces of sister states. It seems to be an established rule of international law that allied forces are entirely exempt from the jurisdiction of the host country. This principle, which was pronounced in this country in an early statement of Chief Justice Marshall,[182] has undergone certain limitations in recent years. In fact, the existence of numerous international treaties and national statutes seems to cast doubts on its general applicability under modern conditions. The most important international agreement is that regarding the United States troops stationed in Great Britain, which is embodied in an exchange of diplomatic notes (July 27, 1942) and in an act of Parliament.[183] While Section 1(1) of that act excludes, subject to certain limitations, criminal proceedings before any British court against a member of the forces of the United States, the question of civil jurisdiction, particularly with regard to contractual and similar debts, remains unsettled.[184] If the civil jurisdiction of the host country

supra note 153, § 355, providing that certain common crimes, "if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but a more severe punishment. . . shall be preferred." The Versailles Treaty art. 228, limited the prosecution of war crimes to enemy nationals.

[180]See § 6 of the Model Act Providing for Fresh Pursuit by Military Forces, in Bacon, *The Model State Guard Act* (1941) 10 FORDHAM L. REV. 41, 52; and *e.g.* LA. GEN. STAT. 1939 (Supp. 1942) § 4505.43. *See also* BECKWITH-HOLLAND-BACON-MCGOVERN, *op. cit. supra* note 37, at 27, 62.

[181]Many states have made special provision for this eventuality in their militia laws. See *e.g.* IDAHO CODE ANN. (1932) § 45.110.

[182]The Schooner Exchange v. McFaddem, 7 Cranch 116, 3 L. ed. 488 (U. S. 1812), where the Supreme Court held that a public armed vessel of a friendly power entered an American port on the implied promise of exemption from the jurisdiction of the local courts. Dicta to the same effect are contained in Coleman v. Tennessee, 97 U. S. 509, 515, 24 L. ed. 1118, 1121, 1122 (1878) and Dow v. Johnson, 100 U. S. 158, 165, 25 L. ed. 632, 635 (1879) which, though involving troops of hostile powers, discussed the rights of troops of friendly powers as well. *See also* King, *Jurisdiction over Friendly Foreign Armed Forces* (1942) 36 AM. J. INT. L. 539; Bustamente Code, art. 299, in Convention of Priv. Int. L., FINAL ACT OF THE 6TH INT. CONF. OF AM. STATES (1928) 16.

[183]Approved by the King, August 6, 1942; 5 & 6 Geo. 6, c. 31. See Schwelb, *The Status of the United States Forces in English Law* (1944) 38 AM. J. INT. L. 50; Goodhart, *The Legal Aspect of the American Forces in Great Britain* (1942) 28 A. B. A. J. 762; Kuratowski, *International Law and the Naval, Military and Air Force Courts of Foreign Governments in the United Kingdom* (1943) 28 TRANSA. OF THE GROTIUS SOC. 1; Wigmore, *The Extraterritoriality of the United States' Armed Forces Abroad* (1943) 29 A. B. A. J. 121; Rheinstein, *Military Justice, in War and the Law* (Charles R. Walgreen Foundation Lectures), (1944) 161.

[184]On the civil liability of British and American forces in New Zealand, see Mc-

is recognized, it might be held to include certain tort claims[185] as to which, too, the defense of obedience to orders might create nice problems of conflict of laws.[186]

(c) Enemy forces—Enemy soldiers can be prosecuted before domestic tribunals for the violation of "generally recognized laws and usages of war," whether such violation constitutes an ordinary crime[187] or not.[188] The question by which law responsibility and penalty are to be determined in such cases, will gain particular importance in the post-war trials of enemy criminals pleading obedience to orders.

(1) If the crime was committed in occupied territory, the law of such territory will probably be applied in determining the validity of the defense of obedience. This principle was recognized in the Joint Communiqué of the Tripartite Conference of Moscow, November 1, 1943, where it was announced that German war criminals would be sent back to those coun-

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Gechan, *Allied Armed Forces in New Zealand* (1942) 18 N. Z. L. J. 209, 222, 234, particularly with regard to the liability of soldiers on leave. *See also* Note, *Soldier and the Law* (1933) 175 L. T. 141.

[185]But see King, *supra* note 182, at 564 who, while urging that soldiers of foreign countries should be responsible before the courts of the host country for contractual debts, feels that it is "quite clear that no civil suit should be entertained by any court of the host country against an officer, soldier, or sailor for any act or omission in the line of his duty."

[186]"Any defence to the action under the *lex fori* is available to the defendant, though such a defence might not be valid by the *lex loci*." 3 JOHNSON, THE CONFLICT OF LAWS (1937) 395. See in general HANCOCK, TORTS IN THE CONFLICT OF LAWS (1942) 84, 100.

[187]Garner, *Punishment of Offenders against the Laws and Customs of War* (1920) 4 AM. J. INT. L. 70, 73; Bartlett, *Liability for Official War Crimes* (1919) 35 L. Q. REV. 177, 186; Cohn, *supra* note 178, at 128. This rule is also recognized in the German KRIEGSBRAUCH IM LANDKRIEGE. See Garner, *Punishment of Offenders against the Laws and Customs of War* (1920) 4 AM. J. INT. L. 75. It is the prevailing opinion that domestic legislation is not needed to establish a penalty for acts punishable under international law. See *ex parte* Quirin, 317 U. S. 1, 63 Sup Ct. 1 (1942); Glueck, *By What Tribunal Shall War Offenders Be Tried?* (1943) 56 HARV. L. REV. 1059, 1071, 1082. Regarding the question of individual responsibility under international law in general see Manner, *The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War* (1943) 37 AM. J. INT. L. 407. Kelsen, *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals* (1943) 31 CAL. L. REV. 530.

[188]A mere technical violation "is a totally different thing from a crime" (Att'y Gen. in oral argument in the Saboteurs' Case, p. 125, as quoted by FAIRMAN, *op. cit. supra* note 6, at 185). *See also* U. S. ARTICLES OF WAR, art. 12; RULES OF LAND WARFARE, BASIC FIELD MANUAL FM 27-10 (1940) §§ 345 *et seq.* On the Saboteurs' Case see *e.g.* Cushman, *Ex parte Quirin et al.—The Nazi Saboteur Case* (1942) 28 CORNELL L. Q. 54; Note (1943) 56 HARV. L. REV. 631; Kaplan, *Constitutional Limitations on Trials by Military Commissions* (1943) 92 U. OF PA. L. REV. 119; FAIRMAN, *op. cit. supra* note 6, at 175 *et seq.* That enemy soldiers are not liable for acts done in accord with the usages of civilized warfare, has been held repeatedly. Dow v. Johnson, 100 U. S. 158, 25 L. ed. 632 (1879); Freeland v. Williams, 131 U. S. 405. 416, 9 Sup. Ct. 763 (1889); Ford v. Surget, 97 U. S. 594, 606, 24 L. ed. 1018 (1878).

tries in which they have committed their crimes "in order that they may be judged and punished according to the laws of these liberated countries."[189] If, however, the crime was committed in the wrongdoer's own country or on the high seas,[190] the enemy soldier will attempt to invoke his own law[191] which, having recognized an absolute defense of obedience to orders even after the first world war,[192] will clearly do so now with its sanctification of the leader's will, thus leaving responsible for the crimes committed in the Fuehrer's name, only the Fuehrer himself.[193]

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[189]See FAIRMAN, *op. cit. supra* note 6, at 275. *See also* Garner, *supra* note 187, at 76; RULES OF LAND WARFARE, *supra* note 188, § 285.

[190]See Garner, *supra* note 187, at 81. *See also* STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1865) .566; DICEY, CONFLICT OF LAWS (5th ed., Keith, 1932) 777 *et seq.*

[191]Cohn, *supra* note 179, at 128, 143: "Offenders can be punished only in accordance with the municipal law of the country where they committed the deed. . . . The role of international law is confined to deciding the question whether an act, which if there were no war, would be punishable as such, is excluded from punishment because it was an act of lawful warfare." *See also* Garner, *supra note* 187, at 78, 80, Glueck, *supra* note 187, at 1062.

[192]On the "Leipzig Trials" see Battle, *The Trials Before the Leipzig Supreme Court of Germans Accused of War Crimes* (1921) 8 VA. L. REV. 1; Hyde, *Punishment of War Criminals* (1943) PROCEEDINGS OF THE AM. SOC. OF INT. L. 39, 41, n. 10; Cohn, *supra* note 179, at 133 with further literature. The pre-nazi GERMAN MILITARY PENAL CODE § 47 (2) declared responsible a subordinate obey an illegal order which he knew to be unlawful. See MAYER, DER BINDENDE BEFEHLIM STRAFRECHT, BEITR. ZUR STRAFRECHTSWISSENSCHAFT (1930) 598, 605; AMMON, DER BINDENDE RECHTWIDRIGE BEFEHL, 217 STRAFRECHTL. ABH. (1926). While the law does not seem to have been changed, the Nazi literature seems to favor a stricter rule, particularly with regard to S. A. men. HECKEL, WEHRVERFASSUNG UND WEHRRECHT DES GROSSDEUTSCHEN REICHES (Berlin, 1939) 370. See in general SCHMIDT, MILITAERSTRAFRECHT (Berlin, 1936) 57; GLEISPACH, DAS KRIEGSSTRAFRECHT (Stuttgart, Berlin 1941). For a more conservative view see DAMS, DER MILITAERISCHE UNGEHORSAM (Berlin, 1938) 68.

[193]Levy, *The Law and Procedure of War Crime Trials* (1943) 37 AM. POL. SCI. REV. 1052, 1080 mentions the following recent German authorities: SCHMIDT, DIE MILITAERISCHE STRAFTAT UND IHR TAETER (1936); GOESSER, DER MISSBRAUCH DER DIENSTGEWALT (1939). *See also* VERDROSS, VOELKERRECHT (Berlin, 1937) 298; Dickinson, PROCEEDINGS OF AM. SOC. OF INT. L. (1943) 49. It has been urged frequently that the axis war leaders should not be given the chance of a trial, neither purportedly nor in fact. See Warren, PROCEEDINGS OF AM. SOC. OF INT. L. (1943) 51 *et seq.;* Wright, PROCEEDINGS OF AM. SOC. OF INT. L. (1943) 55; Finch, PROCEEDINGS OF AM. SOC. OF INT. L. (1943) 57; Cohn, *supra* note 179, at 142 (*"de maximis non curat lex"*) See in general Brierly, *Do We Need an International Criminal Court* (1927) 8 BRIT. Y. B. INT. L. 81; Anderson, *The Utility of the Proposed Trial and Punishment of Enemy Leaders* (1943) 37 AM. POL. SCI. REV. 1081; Hoover, *The Outlook for "War Guilt" Trials* (1944) 59 POL. SCI. Q. 40.

Often it may even go too far to hold officers liable for acts of their subordinates. Garner, *supra* note 187, at 88. *Cf.* the President's declaration concerning the punishment of Japanese officers (N. Y. Times, April 22, 1943, p. 4) and the Declaration of London Jan. 13, 1942, regarding war crimes. Levy, *The Law and Procedure of War Crime Trials* (1943) 37 AM. POL. SCI. REV. 1052, 1080: Finch, *Retribution for War Crimes* (1943) 37 AM. J. INT. L. 81, 84; Munro, *What Court Should Try Hitler* (1944) 94 L. J. 139.

Surprisingly enough both the British Manual and U. S. Rules of Land Warfare have adopted a rule which would seem to permit such a plea. The British Manual (1914, No. 443) provided that "members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their government or by their commander are not war criminals and cannot therefore be punished by the enemy.[194] The U. S. Rules of Land Warfare provide that "individuals of the armed forces will[195] not be punished . . ." in case they act ". . . under the orders or sanction[196] of their government or commanders."[197]

The validity of these rules, of which the Germans made good use after the last war,[198] has been frequently attacked.[199] They have been said to have "no statutory or other authority"[200] and to have been expressly rejected in the Washington treaty of 1922 concerning the use of submarines, which was directed against any violator of its rules "whether or not such person is under orders of a governmental superior."[201]

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[194]The most recent edition of this manual is dated 1939. None of the 32 amendments published, has affected article 443. Levy, *The Law and Procedure of War Crime Trials Since 1929* (1943) 37 AM. POL. SCI. REV. 1080; Hayman, *The Manual of Military Law and its Amendments* (1943) 93 L. J. 350. *See also* MANUAL OF THE AIR FORCE (1933) 180.

[195]The use of the word "will" instead of the word "can" in the British model (*supra* note 194) seems to represent an important modification of the British rule.

[196]This addition to the rule as embodied in the British Manual (*supra* note 194) would enable the enemy government to save its nationals from punishment even by a blanket subsequent sanction. See Sack, *Punishment of War Criminal and the Defence of Superior Order* (1944) 60 L. Q. REV. 63, 67.

[197]*Supra* note 153. *Cf.* U. S. RULES OF LAND WARFARE (1917 ed.) § 366.

[198]See *e.g.* the case of Commander Neumann and The Dover Castle (German Sup. Ct. 1921) (1922) 16 AM. J. INT. L. 704, in which the sinking of a hospital ship was held justified by superior order, with express reference to article 443 of the British Manual (*supra* note 194). See Battle, *supra* note 192; Sack, *supra* note 196, at 67.

[199]See *e.g.* PHILLIPSON, INTERNATIONAL LAW AND THE GREAT WAR (1915) 260; Bartlett, *supra* note 187, at 191; Higgins, Book Review (1922) 38 L. Q. REV. 104; 2 OPPENHEIM, INTERNATIONAL LAW (Lauterpacht, 6th ed. 1940) 453; HALL, INTERNATIONAL LAW (8th ed. 1924, Higgins) 499; Bellot, *War Crimes: Their Prevention and Punishment* (1917) 2 TRANSA. GROTIUS SOC. 31, 46 denying to the Manual any "statutory force or official authority," regarding it as "only intended for the guidance of officers." *See also* 2 GARNER, INTERNATIONAL LAW AND THE WORLD WAR (1920) § 588; Pollock, *The Work of the League of Nations* (1919) 35 L. Q. REV. 193, 195; Eagleton, *Punishment of War Criminals by the United Nations* (1943) 37 AM. J. INT. L. 495, 497; Nast, *supra* note 171: Merignhac, *supra* note 171; Munro, *War Criminals and the Neutrals* (1943) 93 L. J. 379, 380.

[200]Lord Cave, *War Crimes and their Punishment* (1923) 8 TRANSA. GROTIUS SOC. XIX, XXIII. *But cf.* Manner, *supra* note 187, at 417; Cohn, *supra* note 179, at 144. The rule of the Manuals owes its formulation probably to one of the co-authors, Professor Oppenheim, who advocated it strongly in 2 OPPENHEIM, INTERNATIONAL LAW, 1st.-5th ed. § 253. *But cf.* the most recent edition by Lauterpacht, *supra* note 199.

[201]Article 3, in Supplement (1920) 16 AM. J. INT. L. 57, 59. This provision has been

Moreover, the general applicability of the enemy's law to his crimes was denied as early as 1837 in the celebrated case of *People* v. *McLeod*.[202] In that case a British soldier who, obeying superior orders, had taken part in the destruction of an American boat, was held responsible for the resulting loss of lives. The court, refuting defendant's argument "about the extreme hardship of treating soldiers as criminals, who . . . are obliged to obey their sovereign," denied "that a soldier is bound to do any act contrary to the law of nature, at the bidding of his prince," and added that, if he were so bound, "he must endure the evil of living under a sovereign, who will issue such commands."[203]

Whatever be the authority invoked for this or similar limitations of the applicability of the enemy's law to his defense of obedience, whether it be the "law of nature," as in the *McLeod* case, or the "law of humanity,[204] the "Christian faith," a "higher law" of "international morality,"[205] or simply the absence of an international law rule supporting the national rule,[206] common opinion now seems to demand such limitation. It is less clear, however, what legal rule should apply instead of the municipal law. A "universal law of nations"[207] seems to be referred to in Section 355 of the United States Rules of Land Warfare, dealing with "crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape."[208] It has been shown that there is no rule recognized by "all penal codes" regarding the validity of the defense of obedience to orders. Any new rule of international law, on the other hand, possibly even a purportedly declaratory statement of the "customary or conventional law," might be objectionable as an *ex post facto* law.[209] The defense of obedience to orders has, therefore, recently

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said to represent the abandonment of the rule of the Manuals by the United States and Great Britain. Lord Cave, *supra* note 200, at XLII. This interpretation, however, is open to doubt. It may be argued that a submarine commander violating the treaty is denied the benefit of the rule of the Manuals only because of having committed "an act of piracy" (Washington Agreement, article 3). See VERDROSS, *op. cit. supra* note 193, at 298.

[202]25 Wend. 483, 37 Am. Dec. 328, (N. Y. 1841).

[203]*Id.* at 543, 37 Am. Dec. at 354. For a recent British criticism of this case see Sack, *supra* note 196, at 65.

[204]See Glueck, *supra* note 187, at 1079; Warren, *supra* note 193, at 53.

[205]See Dickinson, *supra* note 193, at 47.

[206]Sack, *supra* note 196, at 68.

[207]Glueck, *supra* note 187, at 1087; Dickinson, *supra* note 193, at 49.

[208]U. S. RULES OF LAND WARFARE, *supra* note 153, at § 355. See *e.g.* the Code of International Criminal Law drafted by Levitt, in 6 RÉVUE INTERNATIONALE PÉNITENTIAIRE 18 (cited, Cohn, *supra* note 179, at 141).

[209]See Cohn, *supra* note 179, at 143; Eagleton, *supra* note 199; Garner, *supra* note 145, at 71, 72, n. 5; Hyde, *supra* note 192, at 43, n. 13.

been called a "borderline case" between international and municipal regulation.[210]

For the assumption of a rule of international law it would seem not to be indispensable, however, that such rule be recognized by the laws of all civilized nations. Besides conventions and customs, a third group of rules has come to be recognized as a source of international law: "the general principles of law recognized by civilized nations."[211] These principles for whose validity general acceptance is neither necessary nor sufficient,[212] are invoked in many situations in which the municipal laws have not developed uniform rules, as with regard to the theory of civil liability (fault and causation),[213] the scope of indemnification (*damnum emergens* and *lucrum cessans*,[214] direct and indirect causation),[215] the doctrines of *respondeat superior*[216] and of necessity.[217] Even rules as to the amount of interest[218] and as to periods of statutes of limitations[219] have been laid down by international tribunals in the absence of both agreement and uniform custom. While acceptance by a majority of jurisdictions has been

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[210]Glueck, *supra* note 187, at 1087, n. 84. See also Kelsen, *supra* note 187, at 556.

[211]Article 38 (3) of the STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE IN HAGUE. This rule is declaratory of existing law. 1 OPPENHEIM, INTERNATIONAL LAW (Lauterpacht, 5th ed., 1937) 28. *Cf.* Verdross, *Les Principes Généraux du Droit dans la Jurisprudence Internationale* (1935) 52 RECUEIL DES COURS (Académie de Droit International) 195, 228. For a bibliography see *id.* at 250.

[212]VERDROSS, VOELKERRECHT (Berlin, Springer, 1937) 76.

[213]See Ripert, *Les Règles du Droit Civil Applicables aux Rapports Internationaux* (1933) 44 RECUEIL DES COURS (Académie de Droit International) 569, 608; Wise, *Tort at International Law* (1923) 17 AM. J. INT. L. 245; VERDROSS, *op. cit. supra* note 212, at 166; also 211, at 239.

[214]See *e.g.* The Horace B. Parker (1926) 20 AM. J. INT. L. 379; United States v. Guatemala (1930) 24 AM. J. INT. L. 799, 819.

[215]See *e.g. Mixed Claims Comm. of the United States and Germany,* Adm. Dec. No. I (1924) 18 AM. J. INT. L. 175, 184.

[216]See *e.g.* Ripert, *supra* note 213, at 620.

[217]See *e.g.* Wolff, *Les Principes Généraux du Droit* (1931) 36 RECUEIL DES COURS (Académie de Droit International) 483, 519.

[218]See The Wimbledon, Collection of Judgments, Series A, no. 1, at 32, fixing the interest rate at 6 per cent, as being fair "in the present financial situation of the world."

[219]See King, *Prescription of Claims in International Law* (1934) 15 BRIT. Y. B. INT. L. 82, 96, referring to a "general rule of jurisprudence"; Cavaglieri, *Il Decorso del Tempo ed i suoi Effetti sui Rapporti Guiridici Internazionali* (1926) RIV. DI DIRITTO INTERNAZIONALE 169, 182, invoking "una di quelle generali massime di guistizia, di diritto naturale, di equita. . ."; Bluehdorn, *Le Fonctionnement et la Jurisprudence des Tribunaux Arbitraux Mixtes* (1932) 41 RECUEIL DES COURS (Académie de Droit International) 141, 195, quoting the following statement of the Franco-Bulgarian Tribunal: "Positive international law has not yet established a precise rule generally adopted as to the principle and the duration of prescription. . . yet the principle appears as a rule of the positive law recognized by all jurisdictions; it is but the expression of a great principle of peace which is the basis of the common law as well as of all systems of civilized jurisprudence." (translation).

said to be the criterion applied in such cases,[220] it would seem that equity and the observation of prevailing trends are the real forces determining the decision.

It is submitted that the validity of the defense of obedience to orders should and could be determined according to such "general principles." So much seems clear, that both common-law[221] and pre-axis civil law jurisdictions deny criminal as well as civil immunity for wrongs committed in obedience to orders, while recognizing certain exceptions to this general rule. These exceptions may be classified roughly in two groups: (1) The soldier who could reasonably assume, when obeying an unlawful order, that such order was lawful, will be relieved of his liability, under a theory of mistake of fact, mistake of law, or under an independent principle.[222] (2) He will not be held liable if he obeys an unlawful order under actual compulsion.[223] While there may be some doubt as to whether these exceptions apply equally to criminal and civil cases, and as to whether their existence must be proved by the plaintiff or by the defendant, it would seem that these exceptions have been recognized widely and frequently enough to constitute "general principles" of international law as well as guides for the future development of the common law of this country.[224]

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[220]See Verdross, *supra* note 211, at 211.

[221]In view of its philosophical basis, the common law would seem to have special significance in the ascertainment of general principles of international law. Both these principles and the rules of the common law rest "upon natural justice." Lansing, *Notes on World Sovereignty* (1921) 15 AM. J. INT. L. 13, 23, 27. See *e.g.* Bowditch v. Boston, 101 U. S. 16, 19, 25 L. ed. 980, 981 (1879).

[222]See the common law rule of palpable illegality, *supra* pp. 183, 197, 202.

[223]It has been pointed out that this rule has not only found wide recognition in civil law jurisdictions (*supra* p. 208) and has probably been the basis of the immunity rule of the British Manual and the U. S. Rules of Land Warfare (*supra* p. 209), but that it has been applied as valid law in several American cases (*supra* p. 207).

[224]The proposed substitution of a principle of liability in the absence of reasonable mistake and coercion, for the principles of general immunity and general liability (with or without the defense of apparent lawfulness) seems appropriate in those post-war cases in which obedience to order will be claimed as a defense by common as well as by war criminals. It is probably neither desirable nor feasible to convict all subordinate axis officials who could have recognized the unlawfulness of their criminal actions. But punishment seems justified, where such officials, according to standards to be developed by the tribunal, could have reasonably been expected to disobey unlawful orders, *i.e.*, where they did not act under coercion. War crime tribunals will be reluctant to assume coercion, where entire units, though not the individual defendant, could have been expected to refuse obedience, as in wanton killings of children and prisoners.